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1085
United States
Circuit Court of Appeals
For the Ninth Circuit.

MARYLAND CASUALTY COMPANY, a Corpo-
ration of the State of Maryland,
Plaintiff in Error,
vs.

PACIFIC COUNTY, a Municipal Corporation, and
One of the Counties of the State of Washing-
ton, and J. L. GLAZEBROOK, as County
Treasurer of Said Pacific County,
Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
Western District of Washington, Southern Division.

Filed

MAR 20 1917

United States
Circuit Court of Appeals
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MARYLAND CASUALTY COMPANY, a Corporation of the State of Maryland,
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vs.

PACIFIC COUNTY, a Municipal Corporation, and
One of the Counties of the State of Washington, and J. L. GLAZEBROOK, as County
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

JOHN W. ROBERTS, Esquire, 1304 Alaska Building, Seattle, Washington,

GEORGE L. SPIRK, Esquire, 1304 Alaska Building, Seattle, Washington,

Attorneys for Defendant and Plaintiff in Error.

CHARLES O. BATES, Esquire, National Realty Building, Tacoma, Washington,

CHARLES T. PETERSON, Esquire, National Realty Building, Tacoma, Washington, and

JOHN I. O'PHELAN, Esquire, Raymond, Washington,

Attorneys for Plaintiffs and Defendants in Error. [1*]

In the United States District Court, for the Western District of Washington, Southern Division.

No. 1949.

PACIFIC COUNTY, WASHINGTON,

Plaintiff,

vs.

MARYLAND CASUALTY COMPANY,

Defendant.

Amended Praecipe and Transcript.

To the Clerk of the Above-entitled Court:

You will please prepare and certify, to constitute the transcript of record on appeal in the above-en-

*Page-number appearing at foot of page of original certified Transcript of Record.

titled cause, typewritten copies of the following enumerated papers, omitting all captions, verifications, acceptances of service, and other endorsements, except file marks:

1. Complaint.
2. Answer.
3. Reply.
4. Decree.
5. Motion for New Trial.
6. Order Denying Motion for New Trial.
7. Bill of Exceptions and Order Settling Bill of Exceptions.
8. Petition for Writ of Error.
9. Assignment of Errors.
10. Order Allowing Writ of Error.
11. Bond on Writ of Error and Approval Thereof.
12. Order Extending Time for Filing Bill of Exceptions.
13. Stipulation That Certain Exhibits be not Printed.
14. Stipulation for Removal of Certain Exhibits.
15. Bond on Writ of Error.
16. Acceptance of Service.
17. Order of Removal.
18. Decision.

JOHN W. ROBERTS,
Attorney for Defendant.

Filed in the U. S. District Court, Western Dist.
of Washington, Southern Division. Jan. 11, 1917.
Frank L. Crosby, Clerk. By F. M. Harshberger,
Deputy. [2]

Complaint.

(Originally Filed in the Superior Court of the State of Washington, for Pacific County.)

Come now the plaintiffs in the above-entitled action and complaining of the defendant for cause of action allege:

I.

That Pacific County is now and at all of the times hereinafter mentioned has been a duly, organized and existing municipal corporation of the State of Washington, and one of the counties of said State. That said J. L. Glazebrook is now and at all times hereinafter mentioned has been the duly elected, qualified and acting county treasurer for said Pacific County, Washington.

II.

That the defendant at all of the times herein mentioned was and now is a corporation, duly organized and existing under and by virtue of the laws of the State of Maryland and as such was at all of said times under and by virtue of the laws of the State of Washington duly authorized to do and transact in said State of Washington the business of a surety company and as a bonding company and to become surety on bonds in the State of Washington and to become surety for hire and executing surety bonds, and at such times was and now is engaged in said business in the State of Washington. That at all of the times herein mentioned the First International Bank was and now is a corporation, duly organized and existing under and by virtue of the laws of the State of Washington, and until the 19th

day of July, 1915, had been engaged in a general banking business and conducting a commercial and savings bank in South Bend, Pacific County, Washington.

III.

That under and pursuant to the laws and statute of the State of Washington the said First International Bank was duly and regularly designated as one of the depositories for the moneys of Pacific County, [3] Washington, and that prior to and including the 19th day of July, 1915, the said First International Bank was duly designated as one of the depositories of the county's moneys, and prior to said date was one of the county depositories. That on said 19th day of July, 1915, there was actually on deposit in the said First International Bank, a banking corporation, the said county depository, the sum of \$52,497.97 of money and funds of Pacific County, Washington.

IV.

That on the 9th day of July, A. D. 1915, the said First International Bank, a banking corporation, as principal, and the defendant above named, the said surety company, as surety, made, executed and delivered their bond to the plaintiffs herein in the sum of \$10,000 to secure the sum and amount of the county's moneys and funds to be deposited in the said First International Bank, a copy of which said bond is hereto attached, marked Exhibit "A" and made a part hereof.

V.

That on the said 19th day of July, 1915, the said

First International Bank, a banking corporation, the said depository, closed its doors and refused to accept deposits or to honor checks drawn upon it or otherwise to transact business, and defaulted in the payment of checks drawn on the said First International Bank by the above-named plaintiff, J. L. Glazebrook, as county treasurer for Pacific County, Washington, and failed and refused to pay said checks and refused to pay said checks so drawn on it as aforesaid, by said J. L. Glazebrook as such county treasurer, after demand duly made on said bank.

VI.

That said First International Bank is insolvent and on the 19th day of July, 1915, closed its doors and ceased to do a banking business and actually turned all of its assets and the [4] management of said bank over to W. E. Hanson, the State Bank Examiner of the State of Washington as provided by law. That said W. E. Hanson is the State Bank Examiner of the State of Washington.

VII.

That on said 19th day of July, 1915, there was actually on deposit in said First International Bank moneys and funds belonging to Pacific County, Washington, deposited therein by J. L. Glazebrook, as county treasurer for said county, the sum of \$52,497.97, which sum of money and funds were secured by the bond, a copy of which is hereto attached as above alleged. That on said 19th day of July, 1915, the said W. E. Hanson, as State Bank Examiner for the State of Washington, took over the affairs of and actual management of and the

possession of the First International Bank and is now actually in the possession thereof.

VIII.

That thereafter and on or about the 19th day of August, 1915, the plaintiffs prepared and served defendant above named a proof of loss and proof of default in writing on the party of the First International Bank, and notice that the said First International Bank had closed its doors and refused to accept deposits or to pay checks drawn upon it, and refused to pay checks drawn on it by the above-named plaintiff, J. L. Glazebrook, as county treasurer of Pacific County, Washington, and that on the 19th day of July, 1915, there was on deposit in said First International Bank, a county depository, the sum of \$52,497.97 of the moneys and funds of Pacific County, Washington.

IX.

That thereafter and on about the — day of ———, 1915, the plaintiffs above named did make demand in writing upon the defendant above named, the said bonding company, for the payment of loss sustained by plaintiffs under the terms and conditions of said [5] bond, which said loss was and is \$10,000.

X.

That the defendant has failed and neglected and refused and still continues to refuse to pay said loss or any part or portion thereof. And that plaintiffs by reason of the refusal of the defendant to pay the said loss or any portion thereof are damaged in the sum of \$52,497.97, together with interest thereon at

the rate of six per cent per annum from and after the 19th day of August, 1915. And that the defendant, under the terms and conditions of the said bond which is hereto attached is liable to the plaintiffs herein in the sum of \$10,000 with interest at the rate of six per cent per annum from the 19th day of August, 1915, no part of which has been paid, and the whole thereof is now due and owing to plaintiffs as aforesaid.

XI.

That since the default of the said First International Bank under the terms and conditions of said bond, neither said First International Bank nor its successor, the said W. E. Hanson, as State Bank Examiner of the State of Washington, paid to the plaintiffs the amount deposited by the plaintiffs in said First International Bank, to wit, the sum of \$52,497.97 or any part thereof, and that said sum is now justly due and owing from said bank to plaintiffs herein.

XII.

That by reason of the failure of the said defendant to pay to plaintiffs the amount of its said bond the plaintiffs were and are damaged in the sum of \$10,000, together with interest thereon at the rate of six per cent per annum from August 19, 1915.

XIII.

That the sum of \$500 is a reasonable attorney's fee to be allowed to the plaintiffs herein to be taxed as a part of the [6] costs and the penalty of the bond under the terms and conditions thereof.

WHEREFORE plaintiffs pray judgment against the said defendant in the sum of \$10,000, together with interest thereon at the rate of six per cent per annum from and after the 19th day of August, 1915, together with \$500 as attorney's fee. Together with the costs of this suit.

2.

Plaintiffs pray for such other and further relief as to the Court may seem meet and agreeable to equity.

3.

Plaintiffs pray for general relief.

(Signed) JOHN I. O'PHELAN,
Attorney for Plaintiffs.

(Duly verified.)

Exhibit "A"—Depository Bond.

DEPOSITORY BOND.

Amount \$10,000.

KNOW ALL MEN BY THESE PRESENTS: That First International Bank of South Bend, Washington, as Principal, and Maryland Casualty Company, a corporation, of the State of Maryland, as surety, are firmly held and bound unto J. L. Glazebrook, Treasurer of the County of Pacific, State of Washington, in the sum of Ten Thousand Dollars (\$10,000) for the payment of which, well and truly to be made, we hereby bind ourselves, our and each of our successors and assigns, jointly and severally, firmly by these presents:

DATED this 9th day of July, A. D. 1915.

WHEREAS, the said principal, First International Bank, has been designated by J. L. Glaze-

brook, Treasurer of Pacific County, as a depository of the current funds in the hands or possession of the said Treasurer J. L. Glazebrook, to be deposited in the said bank; the amount whereof shall be subject to withdrawal or diminution by said Treasurer, as the requirements of said County shall demand, and which amount may be increased or decreased as the said Treasurer may determine, and

WHEREAS, the said Bank, in consideration of such deposit and of the privilege of keeping same, has agreed to pay the County of Pacific, State of Washington, interest on said sum upon the average daily balance the said Bank shall have on deposit for the month or any fraction thereof next preceding and crediting of said interest, which interest shall be computed and credited to the account of J. L. Glazebrook, Treasurer of said County of Pacific, State of Washington, [7] and shall become thenceforth a part of such deposit.

NOW THEREFORE, if the said FIRST INTERNATIONAL BANK shall at the beginning of every month render to the Treasurer of the County of Pacific, State of Washington, a statement showing the daily balance of such County moneys held by it during the month next preceding and the interest thereon, and how the same has been credited, and shall well and truly keep all such sums of money so deposited, or to be deposited, as aforesaid, and the interest thereon, subject at all times to the check and order of J. L. Glazebrook, Treasurer as aforesaid, and shall pay over the same, or any part thereof, upon the check or written demand of said Treasurer,

or to his successor in office, and shall calculate, credit, and pay such interest, as aforesaid, and shall in all respects save and keep the said County and the County Treasurer of the said County, harmless and indemnified for and by reason of the making of said deposit or deposits and shall in all respects comply with House Bill No. 90, entitled "An Act regulating the keeping and deposit of public funds in Banks by the several Treasurers of the State of Washington," passed by the Legislature of the State of Washington at its Tenth regular session, in the year 1907, then this obligation shall be void and of no effect, otherwise to be and remain in full force and effect.

PROVIDED: FIRST, That the Maryland Casualty Company, surety on said bond shall have the right to terminate its liability under this obligation by serving notice of its election so to do upon the said treasurer, and the said surety shall be discharged from any and all liability hereunder for any default of the said First International Bank occurring after the expiration of thirty (30) days after the service of such notice.

SECOND: The Surety shall only be liable for such proportion of the total loss or damage sustained by said obligee, by reason of any default of the Principal embraced within the terms of this bond, as the penalty of this bond shall bear to the total sum of all bonds and securities which may be given to secure the deposits above referred to; and in no event shall the Surety hereunder be liable for any sum in excess of the penalty of this bond.

IN WITNESS WHEREOF we have hereunto affixed our corporate seals and caused this bond to be duly signed, by our respective authorized officers, agents or attorneys in fact, the date and year first hereinbefore written.

(Official Seal)

FIRST INTERNATIONAL BANK.

By J. A. SODERBERG,
President.

Attest: ELIAS PIERSON,
Cashier.

MARYLAND CASUALTY COMPANY.

By HENRY C. EORNY and
JOHN W. ROBERTS,
Its Attorneys in Fact.

Witnessed:

H. B. KELSEY. [8]

Approved:

JOHN I. O'PHELAN,
At Prosecuting Attorney.
J. L. GLAZEBROOK,
Co. Treas.

[Endorsements]: Filed July 19, 1915. Z. B. Brown, Clerk. Recorded Official Bonds, Vo. 3, page 372.

[Endorsements]: "Filed Dec. 10th, 1915. Z. B. Brown, Clerk. By A. D. Gillies, Deputy."

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jan. 3, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [9]

Order of Removal.

(From the Superior Court of the State of Washington for Pacific County.)

This cause coming on for hearing on due notice upon the application of the defendant herein for an order transferring this cause to the United States District Court for the Western District of Washington, Southern Division, and it appearing to the Court that the defendant has filed its petition for removal in due form of law and that said defendant filed his bond, duly conditioned, with good and sufficient surety, as provided by law, and it appearing to the Court that this is a proper cause for removal to said United States District Court, NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that this cause be, and it hereby is, removed and transferred to the United States District Court for the Western District of Washington, Southern Division, and that no further proceedings be had herein except to transmit a certified copy of the record to said court, and the clerk of this court is hereby directed to make certified copy of the record in said cause for transmission to said court forthwith.

Done in open court this 27th day of December, 1915.

EDWARD H. WRIGHT,
Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jan. 3, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [10]

Answer.

Comes now the defendant Maryland Casualty Company, and for answer to the complaint of plaintiff, denies and alleges:

I.

Answering paragraph II, denies that the First International Bank was, until the 19th day of July, 1915, engaged in a general banking business, and denies that it was at any time after the 16th day of July, 1915, engaged in a general banking business, and denies that said First International Bank was at any time after the 16th day of July, 1915, engaged in or conducting a banking business of any kind.

II.

Answering paragraph III, denies the same and the allegations and averments therein contained.

III.

Answering paragraph IV, denies the same, except as it may be hereinafter qualified, and denies generally the allegations and averments in said paragraph contained, except as the allegations of said paragraph may be hereinafter admitted.

IV.

Answering paragraph V, denies the same, and denies that the First International Bank was open for banking business at any time after July 16, 1915.

V.

Answering paragraph VI, denies the same, except it admits that W. E. Hanson is the State Bank Examiner for the State of Washington, and admits that said bank was turned over to said W. E. Hanson, but denies it was turned over to him on the 19th day of July, 1915, or at any date later than the 17th day of July, 1915. [11]

VI.

Answering paragraph VII, denies the same, except that it admits that the State Bank Examiner of the State of Washington is now in possession of the First International Bank and its affairs.

VII.

Answering paragraph VIII, denies the same.

VIII.

Answering paragraph IX, admits that the plaintiff did make demand upon the defendant for the payment of \$10,000, and that said demand was and is refused, and denies each and every other allegation in said paragraph contained.

IX.

Answering paragraph X, admits that it refuses to pay the amount demanded or any part thereof, and denies each and every other allegation and averment in said paragraph contained.

X.

Answering paragraph XI, admits that it has not paid anything to the First International Bank, and denies each and every other allegation and averment in said paragraph contained.

XI.

Answering paragraph XII, denies the same.

XII.

Answering paragraph XIII, denies the same, and denies that \$500 or any other sum is a reasonable attorney's fee to be allowed, and denies the right of plaintiffs to recover an attorney's fee in this cause.

SECOND.

For a second and further answer, and by way of affirmative defense, the defendant, Maryland Casualty Company, alleges: [12]

I.

That on or about the 9th day of July, 1915, application was made to the Maryland Casualty Company at Seattle, in King County, Washington for the execution of a depository bond, to be executed to J. L. Glazebrook, treasurer of the county of Pacific, with the First International Bank as principal and Maryland Casualty Company as surety thereon, in the sum of ten thousand dollars (\$10,000) and that in pursuance of said application there was executed at Seattle, Washington, on or about the 9th day of July, 1915, a depository bond or instrument, a copy of which is attached to the complaint of plaintiffs.

II.

That said bond was on the 10th or 11th day of July, 1915, mailed from Seattle, Washington, to First International Bank at South Bend, Washington, and the same was received by said J. L. Glazebrook at South Bend, Washington, on the 14th day of July, 1915, and not prior to that date.

III.

That on the 14th day of July, 1915, said J. L. Glazebrook, in a letter dated and written on the 14th day of July, 1915, but not mailed until a date later than July 14th, 1915, notified the Maryland Casualty Company of the receipt of said bond on that day and that he would not accept nor approve said bond, because the same was not in proper form, and not in a form which the Prosecuting Attorney of Pacific County, Washington, would approve; that said letter was duly signed and executed by J. L. Glazebrook, the obligee named in said bond, and the Treasurer of Pacific County, Washington, and by him mailed to Seattle, Washington.

IV.

That the said J. L. Glazebrook in addressing the said letter made a mistake and addressed the same to the wrong office in [13] Seattle, Washington, and that because of said mistake in the address, the said letter of J. L. Glazebrook notifying the Maryland Casualty Company that he would not approve nor accept the bond was not delivered to the Maryland Casualty Company or its proper officers or agents until about the 20th day of July, 1915.

V.

That thereupon the Maryland Casualty Company, on the 22d day of July, 1915, notified the said J. L. Glazebrook, obligee, that it would not execute another or different bond, and that it would not execute a bond in the form suggested and required by said J. L. Glazebrook, and requested said Glazebrook

to return the form of bond which had been mailed to him.

VI.

That the said First International Bank of South Bend, Washington, while it opened its doors on the morning of July 17, 1915, and kept them open until noon of July 17, 1915, did no banking business on the 17th day of July, 1915; that while said bank on the forenoon of July 17, 1915, did receive a few deposits, the same were not placed into the drawers or vaults of the bank, and were not mingled with the funds of the bank, and became at no time any part of the funds on deposit in said bank, but the officers of said bank, knowing the same to be insolvent, and knowing that it was unable to further do a banking business, kept said deposits separate and distinct, and laid them aside, and at noon on the 17th day of July, 1915, closed its doors and immediately returned to the depositors all of the funds or moneys or property in any manner attempted to be deposited with said bank on the forenoon of July 17, and said bank transacted no business of any kind or character upon the 17th day of July, and received no money or moneys on deposit on the 17th day of July, 1915, and returned to all of the depositors the funds which it had temporarily held during the forenoon of that day. [14]

VII.

That the officers of said First International Bank, on the 17th day of July, 1915, notified the bank examiner of the State of Washington that it had suspended business, and requested the Bank Examiner

to take immediate charge of said bank, and the officers of the First International Bank were then and there upon the 17th day of July, 1915, notified by said bank examiner that he would take immediate charge and control, possession and management of said bank and of its affairs, and that said bank did no banking business and was not open for banking business after the 16th day of July, 1915, and was surrendered and delivered to the State Bank examiner on the 17th day of July, 1915, and was never at any time open for the transaction of banking business after the 16th day of July, 1915, of all of which the plaintiff J. L. Glazebrook, as county treasurer of Pacific County, Washington, had at all times full knowledge and notice.

VIII.

That it was well and commonly known and understood in South Bend, Washington, and by J. L. Glazebrook on the said 17th day of July, 1915, that said bank had suspended business and was closed, and that no banking business had been transacted by said bank subsequent to July 16, 1915, and that when said temporary deposits were returned, said depositors were all notified that said bank had suspended and closed, and that it was not open and would not be further opened, and it became and was a matter of common knowledge among the inhabitants and residents of South Bend, Washington, that said bank had closed and suspended business, and was in the hands of the Bank Examiner of the State of Washington.

IX.

That the bond of the Maryland Casualty Company set forth in the complaint of plaintiff had not on the 17th day of July, [15] 1915, been approved and accepted nor filed, but that on the 19th day of July, 1915, after the suspension and closing of said bank the said J. L. Glazebrook, for the first time, sought to procure the approval of said bond by other officers or representatives of the county, and did on the 19th day of July, 1915, and not before that date, and after the prosecuting attorney and legal adviser of Pacific County had refused to approve said bond and had advised the said J. L. Glazebrook to refuse to approve and accept the same, procure John I. O'Phelan, prosecuting attorney, to indorse his approval thereon, but said approval was not indorsed thereon at any time prior to the 19th day of July, 1915, and was only approved by said John I. O'Phelan on said July 19, 1915, after said John I. O'Phelan, as legal adviser of said Pacific County had rejected said bond and had prior to and up to that time refused to approve the same, and said bond was not approved by any other officer or representative of Pacific County, Washington, and the said J. L. Glazebrook immediately after having procured said indorsement by John I. O'Phelan, prosecuting attorney, filed said bond, on the 19th day of July, 1915, and not before that date.

X.

That said alleged and attempted approval and filing of said bond after the suspension and closing of said bank was without the knowledge or consent of

the defendant Maryland Casualty Company and said Maryland Casualty Company has never at any time consented thereto, nor in any manner ratified the alleged approval and filing of said bond, and has never at any time acknowledged or admitted any liability or obligation as existing against it on account of said instrument, and alleges that the same never at any time became the bond of the Maryland Casualty Company, as alleged in the complaint, or at all, and that said instrument never at any time became effective as a bond or obligation of the Maryland Casualty Company, '[16]' and that by reason of the premises the same was and is void and of no force and effect as against the Maryland Casualty Company.

WHEREFORE, the defendant Maryland Casualty Company having fully answered the complaint of plaintiff, prays for judgment for dismissal of the same, and for costs.

JOHN W. ROBERTS,
Attorney for Defendant.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jan. 11, 1916.
Frank L. Crosby, Clerk. By F. M. Harshberger, berger, Deputy. [17]

Reply.

Comes now the plaintiffs in the above-entitled action and replying to the answer of the defendant, admit, allege and deny as follows, to wit:

1.

Plaintiffs reiterate each and every allegation contained in each and every paragraph of the complaint and the whole thereof.

2.

Plaintiffs deny each and every allegation of new matter contained in the answer of the defendant.

Plaintiffs replying to the second and further answer and affirmative defense of the defendant admit, allege and deny as follows:

1.

Plaintiffs admit paragraph No. One of said answer and affirmative defense.

2.

Plaintiffs deny paragraph No. Two and the whole thereof of said answer and affirmative defense except that plaintiffs admit that on the 12th day of July, 1915, Elias Pierson, the cashier of the First International Bank of South Bend, Washington, delivered to J. L. Glazebrook, as county treasurer, the plaintiff above named, the depositary bond described in plaintiffs' complaint, which was executed by the Maryland Casualty Company and delivered to said J. L. Glazebrook, as county treasurer, by the cashier of the First International Bank, and that the said bond was received by said J. L. Glazebrook as county treasurer in the office of the county treasurer in the county courthouse at South Bend, Pacific County, Washington, on the 11th day of July, 1915, and that said J. L. Glazebrook, as county treasurer, accepted the said bond at said time as a depositary bond.

3.

Plaintiffs deny paragraph No. Three and the whole thereof of said answer and affirmative defense save and except that plaintiffs admit that said J. L. Glazebrook, as county treasurer, did write a letter addressed to the Maryland Casualty Company on or about the 14th day of July, 1915. Plaintiffs deny that said J. L. Glazebrook in said letter advised or notified the said defendant that he did not accept or approve the said bond; but did advise the said defendant that he had accepted the said bond and was holding it and would hold it as a depositary bond to cover county deposits deposited in and to be deposited in the First International Bank of South Bend, Washington.

4.

Plaintiffs deny paragraph No. Four of said answer and affirmative defense and the whole thereof.

5.

Plaintiffs deny paragraph No. Five of said answer and affirmative defense and the whole thereof.

6.

Plaintiffs deny paragraph No. Six of said answer and affirmative defense and the whole thereof save that plaintiffs admit that the First International Bank opened its doors and remained open during all of the banking hours on the 17th day of July, 1915, and did a banking business on said day.

7.

Plaintiffs deny paragraph No. Seven of said answer and affirmative defense and the whole thereof.

8.

Plaintiffs deny paragraph No. Eight of said answer and affirmative defense and the whole thereof.

9.

Plaintiffs deny paragraph No. Nine of said answer and [19] affirmative defense and the whole thereof except that plaintiffs admit that the said bond was approved as required by law but deny that the same was approved on the 19th day of July, 1915. And in that behalf allege that said bond was approved prior to the time that the said First International Bank suspended business and closed its doors.

10.

Plaintiffs deny paragraph No. Ten of said answer and affirmative defense and the whole thereof.

WHEREFORE, plaintiffs pray judgment as prayed for in their complaint.

JOHN I. O'PHELAN,
Attorney for Plaintiffs.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. May 24, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [20]

Memorandum Decision.

CUSHMAN, District Judge.

This is a suit upon a bond given to secure county bank deposits. The case was tried to the Court without a jury upon a written stipulation.

The bond is as follows:

“KNOW ALL MEN BY THESE PRESENTS, That First International Bank of South Bend, Washington, as Principal, and Maryland Casualty Company, a corporation of the State of Maryland, as surety, are firmly held and bound under J. L. Glazebrook, Treasurer of the County of Pacific, State of Washington, in the sum of Ten Thousand Dollars (\$10,000), for the payment of which, well and truly to be made, we hereby bind ourselves, our and each of our successors and assigns, jointly and severally, firmly by these presents.

“Dated this 9th day of July, A. D., 1915.

“WHEREAS, the said Principal, First International Bank has been designated by J. L. Glazebrook, Treasurer of Pacific County, as a depositary of the current funds in the hands or possession of the said Treasurer, J. L. Glazebrook to be deposited in the said Bank; the amount whereof shall be subject to withdrawal or diminution by said Treasurer, as the requirements of said County shall demand, and which amount may be increased or decreased as the said Treasurer may determine, and

“WHEREAS, the said Bank in consideration of such deposit and of the privilege of keeping same, has agreed to pay the County of Pacific, State of Washington, interest on said sum upon the average daily balance the said Bank shall have on deposit for the month, or any fraction thereof next preceding the crediting of said interest, which interest shall be computed and credited to the account of J. L. Glazebrook, Treasurer of said County of Pacific, State of

Washington, and shall become thenceforth a part of such deposit.

“NOW, THEREFORE, if the said First International Bank shall at the beginning of every month render to the Treasurer of the County of Pacific, State of Washington, a statement showing the daily balance of such County moneys held by it during the month next preceding and interest thereon, and how the same has been credited, and shall well and truly keep all such sums of money so deposited, or to be deposited, as aforesaid, and the interest thereon, subject at all times to the check and order of J. L. Glazebrook, Treasurer as aforesaid, and shall pay over the same, or any part thereof, upon the check or written demand of said Treasurer, or to his successor in office, and shall calculate, credit and pay such interest, as aforesaid, and shall in all respect save and keep the said County, and the County Treasurer of the [21] said County, harmless and indemnified for and by reason of the making of said deposit or deposits, and shall in all respects comply with House Bill No. 90, entitled “An Act regulating the keeping and deposit of public funds in Banks by the several Treasurers of the State of Washington,” passed by the Legislature of the State of Washington, at its Tenth regular session, in the year, 1907, then this obligation shall be void and of no effect, otherwise to be and remain in full force and effect.

“PROVIDED:

“1. That the Maryland Casualty Company Surety on said bond shall have the right to termin-

ate its liability under this obligation by serving notice of its election so to do upon the said Treasurer, and the said Surety shall be discharged from any and all liability hereunder for any default of the said First International Bank, Principal, occurring after the expiration of thirty (30) days after the service of such notice.

“2. The Surety shall only be liable for such proportion of the total loss or damage sustained by said Obligee, by reason of any default of the Principal embraced within the terms of this bond, as the penalty of this bond shall bear to the total sum of all bonds and securities which may be given to secure the deposits above referred to; and in no event shall the Surety hereunder be liable for any sum in excess of the penalty of this bond.

“IN WITNESS WHEREOF, we have hereunto affixed our corporate seals and caused this bond to be duly signed by our respective authorized officers, Agents, or Attorneys in Fact, the date and year first hereinbefore written.”

On July 9, 1915, the county treasurer's deposits in the bank amounted to \$50,032.07. Saturday, July 10th, the balance was \$50,351.28. Monday, July 12th, the balance is not shown. On July 13th and 14th, \$8,000 of new deposits were made by the treasurer. On Saturday, July 17th, the last day the bank was open, the balance, with interest, was \$52,457.97.

The bond in question is dated July 9, 1915. It was delivered by the insurance broker to the bank and, by the bank cashier to the county treasurer July 12th. The county treasurer testified that it was ap-

proved by him and the county attorney on the same day as delivered to him. The county attorney does not remember when he approved it. It was not filed with the county clerk until after the bank failed to open July 19th. [22]

On Wednesday, July 14th, the county treasurer wrote the defendant at Seattle the following letter:

“In re Bond of First *Internation* Bank.

“We have your depository bond for \$10,000 dated July 9th, 1915, in favor of J. L. Glazebrook, County Treasurer.

“The Prosecuting Atty. refuses to approve any bond carrying the *pro rata* clause, and we ask you to kindly give us a bond in which this item is eliminated, or followed by the following.

“ ‘Provided, however, that if such other bonds or securities are insufficient for any reason to fully make, together with the aforesaid *porporsition* under this bond, the full amount of interest and principal demanded and refused and interest thereafter accruing to time of actual payment to said Treasurer, then and in that event the surety hereunder shall be liable to said Treasurer to the full amount of loss sustained by reason of such insufficiency.’

“If you will deliver to your agent here a bond as stated above we will deliver the bond we now have to him and take the new bond in lieu thereof.

“If you prefer we promise to return to you immediately the old bond above mentioned as of July 9th upon receipt of new bond corrected to read as stated above.

“Thanking you for your kindness in the above matter, we are,”—

This letter was not answered in any way prior to the bank's failure. Although it did not require a day for the mail to reach Seattle from South Bend, the testimony is that this letter did not reach the department of the defendant in charge of such matters until Monday, July 19th, the day the bank failed to open.

For the defense it is contended that the bond covered only future deposits; that it never was accepted by the obligee, nor the defendant notified of its acceptance and that both latter requisites are necessary to a recovery.

The following statutes of the State bear upon the questions in issue:

“Before any such designation or designations shall become effectual and entitle the said treasurer to make deposits in such bank or banks, the bank or banks so designated shall within ten days after such designation or [23] designations have been filed, file with the county clerk of such county a surety bond to such county treasurer, properly executed by some reliable surety company qualified under the laws of this State to do business therein, in the maximum amount of deposits designated by said treasurer to be carried in such bank or banks, conditioned for the prompt and faithful payment thereof on checks drawn by such treasurer, which bond must be approved by the chairman of the board of county commissioners, the prosecuting attorney and the county treasurer, or any two of such officers

of said county, before being filed with the county clerk, and unless so approved the same shall not be received or filed by the county clerk: Provided, that said depositary or depositaries may deposit with the county treasurer good and sufficient municipal, school district, county or State bonds or warrants, United States bonds, first mortgage railroad bonds listed on the New York stock exchange, or local improvement bonds or warrants whose legality have been passed upon favorably by the supreme court or public utility bonds or warrants issued by or under the authority of any municipality of the State for water, power or light plants or maintenance thereof upon which principal or interest is not in default at the time of such deposit, the aggregate market value of which shall not be less than the amount required in said deposit, in lieu of the surety bond herein provided for.”

“5075. The county treasurer shall deposit with any depositary or depositaries which have fully complied with all requirements as herein provided, any county moneys in his hands or under his official control, and for the purpose of making the quarterly settlement and counting funds in the hands of the treasurer any such sums so on deposit shall be deemed to be in the county treasury.”

“8327. Whenever any such official bond shall not contain the substantial matter or condition or conditions required by law, or there shall be any defect in the approval or filing thereof, such bond shall not be void so as to discharge such officer and his sureties, but they shall be bound to the State or party

interested, and the State or such party may, by action instituted in any court of competent jurisdiction, suggest the defect of such bond or such approval or filing, and recover his proper and equitable demand or damages from such officer and the person or *sons* who intended to become and were included in such bond as sureties." (Rem. & Bal. Code.)

Section 5075, above quoted, makes it obligatory upon the county treasurer to deposit with the depository "any county moneys in his hands or under his official control." The last section quoted is applicable to a bond of a depository, such as the one in suit.

[24]

Board of Commissioners v. Duluth, 77 N. W. 815;

State v. Pederson, 114 N. W. 828;

Henry County v. Salmon, 100 S. W. 20, at 24.

The provisions of section 5073 are solely for the protection of the public and its money and, in so far as the filing of the bond is concerned, it is not a matter for the protection, benefit or advantage of a surety or guarantor such as defendant.

Peoples v. Edwards, 9 Cal. 286;

Deer Lodge County v. U. S. F. & G. Co., 112 Pac. 1060;

Buhrer v. Baldwin, 100 N. W. 469;

Henry County v. Salmon, 100 S. W. 20, at 24.

This being the holding of the Court, it is not necessary to consider the effect of the bond as a common law obligation.

The condition of the bond that,

“If the ‘principal’ * * shall well and truly keep all such sums of money so deposited, or to be deposited, as aforesaid, * * then this obligation to be void and of no effect.”

must be construed to contemplate all present and future deposits. Any other construction is, necessarily, forced and strained.

Keppart v. Buddecke, 80 Pac. 501;

Myers v. Board of Commissioners, 56 Pac. 11;

Brown v. Board of Commissioners, 50 Pac. 888.

It is true that in *Brown v. Board of Commissioners* (80 Pacific, 501, *supra*) certain recitals of the bond were different from those of the bond in the present case and that the Court in its ruling, to a certain extent, relied upon these different provisions. [25]

It is a well-known rule of construction, both of statutes and written instruments that all the words used must be given a meaning, unless inconsistencies would result therefrom.

If only future deposits were in view, the words would have been “so to be deposited as aforesaid.” If the meaning of the instrument is as contended for by the defendant, the words “so deposited” serve no purpose. The reference to the prior recital, indicated by the use of the words “so” and “aforesaid” could only relate to the terms of the deposit “subject to withdrawal or diminution by said treasurer as the requirements of said county shall demand.”

Under the statutes and authorities cited above, it was not necessary, in order for the bond to become effective, that it be filed with the county clerk. It became an obligation binding upon the defendant

when the bank delivered it to the treasurer and received, on July 13th and 14th, deposits from him under its protection.

In view of the treasurer's testimony that he and the county attorney approved the bond on July 12th, it is not necessary to consider what, if any, effect the want of such approval would have. It is true that the treasurer, in his letter of July 14th to the defendant, says:

“The Prosecuting Atty. refuses to approve any bond carrying the *pro rata* clause.”

If this be construed as meaning that the county attorney had not approved the bond, in view of the treasurer's sworn testimony that the bond had already been approved by both the county attorney and himself on the 12th of July, coupled with the fact that, on the 13th and 14th—immediately after the receipt of the bond, the treasurer made \$8,000 deposits, which he could not legally make without the bond, yet such unsworn misstatement does not justify the [26] rejection of the sworn testimony, supported by such conduct.

The fact that the treasurer disobeyed the direction of the statute and deposited this money before the filing of the bond with the county clerk in no way takes from the presumption that he, as a public officer, did his duty in other respects.

The defendant's contention that, before it became bound, notice to it of the acceptance of the bond by the county was necessary and that no such notice was given yet remains for consideration. It is not neces-

sary to determine the first question, unless, in fact, no such notice was given.

Passing the question of whether or not the defendant is not inconsistent in contending that the treasurer—who, it maintains, had no authority to accept the bond—could reject it, there is no statute requiring notice to the grantor. The treasurer's letter is not a present rejection of the bond.

Although the bond does not purport to run for any particular term, the defendant could not terminate its liability, save upon 30 days notice of its election so to do.

If entirely satisfactory, it was, no doubt, contemplated that the bond should run for months. The provisions for the monthly report by the bank depositary to the treasurer, alone show this. But there is nothing in the statute, nor the bond, that obligated the county or the treasurer to accept the bond for a definite term or, once accepted, to retain such bond and not require any other in lieu of it for any definite time. It might hold the bond for a day or a year, or until the next January when it would become the duty of the treasurer to designate a depositary.

The pains taken by the treasurer in his letter to point out that, upon receipt of a bond worded to the satisfaction of the county attorney, the bond received and held, would be returned in one of two ways, as the defendant might choose, show that [27] the bond delivered had been accepted for the present, but, as the county and treasurer were not bound to accept it for a definite time, it was accepted

until the imposed conditions were complied with; that, for present purposes, pending negotiations, it would be accepted, but that, unless the imposed conditions were met, it would be rejected.

The letter clearly shows an intention only to reject the bond, by either returning it to the defendant's agent at South Bend, or direct to the defendant in Seattle. This, of itself, is a notice of present acceptance pending negotiations for a more satisfactory bond. It follows that the defendant is liable upon the bond.

In addition to the bonds of guaranty held by the treasurer and county, they held as lawful security for deposits with this bank depository, warrants and local improvement bonds amounting to \$10,519.95.

The stenographer's notes of the testimony have not been extended, for that reason no finding will be now made as to the exact amount for which the defendant is liable under its bond and the *pro rata* provision therein. The Court having held in *Pacific County v. Illinois Surety Company* (cause No. 1962) that there was no liability on the bond involved in that case, if the parties hereto have any difficulty in agreeing upon the extent of the liability under the holdings in that and this suit, they will be further heard.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jun. 17, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [28]

Decree.

This cause having come on regularly for trial before the Court sitting without a jury, a trial by jury having been waived by stipulation of the parties in open court, plaintiffs appearing with John I. O'Phelan, prosecuting attorney of Pacific County, Washington, and Bates, Peer & Peterson, their attorneys, defendant appearing by John W. Roberts, Esq., its attorney, and the Court having heard the evidence offered and adduced in behalf of the respective parties, whereupon said cause was argued to the Court by counsel for the respective parties, and the Court having taken the cause under advisement until the 17th day of June, 1916, when the Court being fully advised in the premises filed its written opinion in said cause finding for plaintiffs and against defendant generally, and having reserved its finding as to the exact amount which plaintiffs were entitled to recover under the bond sued on herein for the purpose of further consideration or proof in that respect, if necessary, and thereafter, and on the 13th day of November, 1916, further proof was offered by the respective parties for the purpose of enabling the Court to make a finding as to the exact amount which plaintiffs were entitled to recover herein, and at the conclusion thereof the Court announced orally its finding as to the question of the exact amount which plaintiffs are entitled to recover herein, and now on this day this cause coming on further to be heard upon the motion of John I. O'Phelan and Bates,

Peer & Peterson, attorneys for plaintiffs, for a judgment in accordance with said written opinion heretofore filed herein, and the Court being duly advised in the premises, and it appearing to the Court that said motion should be sustained,

It is by virtue of the premises, and the Findings and Conclusions in said written opinion filed by the Court, as aforesaid,

ORDERED, ADJUDGED AND DECREED that plaintiff Pacific [29] County is a duly organized and existing municipal corporation and political subdivision of the State of Washington.

That J. L. Glazebrook is, and at the times in the complaint in this action mentioned was, the duly elected, qualified and acting county treasurer of said Pacific County, Washington, and that said Pacific County, and said J. L. Glazebrook are, and at all times in the complaint herein mentioned were, residents and citizens of the State of Washington.

That defendant Maryland Casualty Company is, and at the times mentioned in the complaint in this action was, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and is, and was a resident and citizen of the State of Maryland. That it is, and was authorized by its articles of incorporation to engage in business as a surety and guarantor for the acts of third persons for hire, and to do a general surety business, and at the times in the complaint in this action mentioned was authorized to engage in, and was engaged in such business within the State of Washington.

That the amount in controversy in this action, exclusive of costs, amounted to the sum of ten thousand dollars.

IT IS FURTHER ADJUDGED AND DECREED that prior to the 9th day of July, 1915, the First International Bank of South Bend, Washington, was a banking corporation organized and existing under and by virtue of the laws of the State of Washington, and engaged in a general banking business at the city of South Bend, in Pacific County, Washington. That prior to said date plaintiff J. L. Glazebrook, as county treasurer of Pacific County, Washington, had duly designated said First International Bank of South Bend as one of the depositories for the public moneys of Pacific County, Washington, and that on the 9th day of July, 1915, and at all times thereafter to and including the 21st day of July, 1915, said First International [30] Bank acted as such depository.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that on July 12th, 1915, said First International Bank of South Bend delivered to plaintiff J. L. Glazebrook, as county treasurer of Pacific County, Washington, that certain indenture of bond executed by defendant, introduced in evidence in this action marked Exhibit —, a copy of which bond is attached to the complaint on file in this action and marked exhibit "A," which said bond bears date July 9th, 1915, and which said bond had sometime before its delivery to said county treasurer by said First International Bank of South Bend, been de-

livered to said First International Bank of South Bend by the officers and agents of defendant.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said bond was approved by the county treasurer, and county attorney, and thereafter and on the 19th day of July, 1915, filed in the office of the county clerk of Pacific County, Washington.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said First International Bank of South Bend failed to open its doors on Monday July 19th, 1915, and that said bond was not filed with the county clerk until after it was learned that said bank failed to open its doors.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that on Wednesday, July 14th, 1915, plaintiff as county treasurer of Pacific County, Washington, addressed a letter to defendant's general office at Seattle, Washington, and on said date deposited the same in the United States Postoffice at South Bend, Washington, as follows:

“In re Bond of First International Bank.

We have your depository bond for \$10,000 dated July 9th, 1915, in favor of J. L. Glazebrook, County Treasurer.

. The Prosecuting Attorney refuses to approve any bond carrying the *pro rata* clause, and we ask you to kindly give us a bond in which this item is eliminated, or followed by the following: [31]

‘Provided, however, that if such other bonds or securities are insufficient for any reason to fully make, together with the aforesaid proposition under

this bond, the full amount of interest and principal demanded and refused and interest thereafter accruing to time of actual payment to said Treasurer, then and in that event the surety hereunder shall be liable to said Treasurer to the full amount of loss sustained by reason of such insufficiency.'

If you will deliver to your agent here a bond as stated above we will deliver the bond we now have to him and take the new bond in lieu thereof.

If you prefer we promise to return to you immediately the old bond above-mentioned as of July 9th, upon receipt of new bond corrected to read as stated above.

Thanking you for your kindness in the above matter, we are,"—

That it required one day for this letter to reach Seattle, Washington, from South Bend, Washington, but that it was not answered by defendant until after the 19th of July, 1915.

IT IS FURTHER ADJUDGED AND DECREED, that immediately after the receipt of the bond by the treasurer of Pacific County, Washington, he made deposits in the sum of eight thousand dollars, in the First International Bank of South Bend, Washington, which he could not have legally made without the protection of said bond.

IT IS FURTHER ADJUDGED AND DECREED that said bond was accepted by the county treasurer of Pacific County Washington, for present purposes, and until such time as defendant would furnish it a new bond containing the provisions suggested in the county treasurer's letter of July 14th, 1915.

IT IS FURTHER ADJUDGED AND DECREED, that at the time said First International Bank of South Bend, Washington, failed that plaintiffs had on deposit therein, subject to check, the sum of \$52,-457.97. That there was on file in the office of the clerk of Pacific County, Washington, in addition to the bond of defendant, sued on herein, bonds of other surety companies aggregating thirty-six thousand dollars. That in addition to said bond sued on herein, and said other thirty-six thousand dollars of surety company bonds there was in the hands of plaintiff J. L. Glazebrook, as treasurer [32] of Pacific County, Washington, a certain lot of miscellaneous warrants, bonds etc., which, together with the interest thereon was of the face value of \$7,-567.17, and which have been redeemed by payment of said treasurer of the sum of \$7,567.17.

IT IS FURTHER ADJUDGED AND DECREED that at the time of the failure of said First International Bank of South Bend, Washington, there was also on deposit in the hands of said J. L. Glazebrook, county treasurer, as collateral security for the repayment of deposits in said First International Bank of South Bend, Washington, Local Improvement District Bonds of South Bend, Washington, of the face value of \$2800, and Drainage District warrants of Drainage District No. 2, of Pacific County, Washington, of the face value of \$391.95. That the validity of said Local Improvement District Bonds and of said Drainage District Warrants had not theretofore, and has not since been passed upon by the Supreme Court of the State of Washington.

That said warrants of Drainage District No. 2, of Pacific County, Washington, have no market value whatsoever. That said South Bend Local Improvement District Warrants of the face value of twenty-eight hundred dollars, were sold and disposed of by the County Treasurer of Pacific County, Washington, for the sum of nine hundred and forty-five dollars, which was the reasonable market value thereof, which moneys have been applied by said county treasurer on account of said deposits of \$52,457.97.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the liability of defendant on the bond sued on herein shall be such proportion of said loss of \$52,457.97, as the penalty of said bond, to wit, the sum of ten thousand dollars bears to the total sum of all bonds and securities, to wit, the sum of \$66,519.94.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in arriving at the amount of all bonds and securities given to plaintiffs to secure the deposits in said First International Bank of South [33] Bend, said Drainage District warrants amounting to the sum of \$391.95, and said Local Improvement District Bonds of Aberdeen, Washington, of the face value of \$2800, the validity of which have not been passed upon by the Supreme Court of the State of Washington, are to be taken at their face value.

IN CONSIDERATION OF THE FOREGOING, IT IS ORDERED, ADJUDGED and DECREED that plaintiffs do have and recover of and from defendant judgment in the sum of \$9,281.32, together

with interest thereon at the legal rate from and after the 19th day of July, 1915, and their costs and disbursements herein to be taxed.

To all of which defendant excepts.

By the Court,

EDWARD E. CUSHMAN,

Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 5, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [34]

Petition for New Trial.

Comes now Maryland Casualty Company, and moves and petitions the Court to grant a new trial herein, for the following causes materially affecting the substantial rights of said defendant, to wit:

I.

Insufficiency of the evidence to justify the decision, to wit:

(a) Failure to prove delivery or filing of the bond prior to failure of the bank.

(b) Failure to prove that the bond was approved prior to the time of the failure of the bank.

(c) Failure to prove that the bond was at any time properly approved or filed with the proper authority at any date prior to the failure of the bank.

(d) Failure to prove that the bank had been properly designated as depository.

(e) Failure to prove that moneys were deposited

in the bank subsequent to the approval and filing of the bond.

(f) Failure to prove any loss to the plaintiff for which the Surety Company was in any way liable or responsible. [35]

(g) Failure to prove that plaintiff held any bond of the defendant company at the time of the failure of the bank.

II.

Error in law occurring at the trial, to wit:

(a) Error of the court in rendering judgment in favor of plaintiff against defendant.

(b) Error in holding that plaintiff held a bond of the defendant.

(c) Error in holding that the bond had been legally approved prior to the failure of the bank.

(d) Error in holding that the bank had been legally designated and selected as depository.

(e) Error in finding and holding that money had been deposited subsequent to the approval and filing of the bond, and in holding that the bond had been legally approved.

(f) Error in holding that there had been any loss sustained by the plaintiff for which defendant Surety Company was in any way liable.

(g) Error in fixing the amount of recovery, in that it was too large.

(h) Error in holding that the defendant Surety Company was liable for any deposits made prior to the date of filing the bond.

(i) Error in reception and rejection of testi-

mony, to which exceptions were duly taken at the time.

JOHN W. ROBERTS,

GEO. L. SPIRK,

Attorneys for Defendant.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Dec. 16, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [[36]

Order Overruling and Denying Motion for New Trial.

This cause came regularly on to be heard upon the petition or motion for new trial filed herein by the Maryland Casualty Company, plaintiff present by John I. O'Phelan and Bates, Peer & Peterson, attorneys, and defendant Maryland Casualty Company by John W. Roberts, attorney, and the Court having heard the said motion and argument of counsel doth overrule and deny the same, to which ruling the defendant Maryland Casualty Company duly excepts and exception is allowed.

Dated this 16th day of December, 1916.

EDWARD E. CUSHMAN,

Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 19, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [37]

Order Extending Time to Serve and File Bill of Exceptions.

On motion of defendant, Maryland Casualty Company, in the above-entitled cause, it appearing that there is good cause for such action, and upon stipulation of the parties, it is

ORDERED that said defendant have until January 5th, 1917, within which to make, serve and file its bill of exceptions in said cause.

Done in open court this 24th day of November, 1916.

EDWARD E. CUSHMAN,
Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 25, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [38]

Defendant's Bill of Exceptions.

BE IT REMEMBERED that heretofore, and on May 24th, 1916, above-entitled cause came regularly on for trial in the above-entitled court, before Honorable E. E. Cushman, Judge presiding; the plaintiff appearing by Bates, Peer and Peterson, and John I. O'Phelan, the defendant, Maryland Casualty Company, appearing by John W. Roberts and George L. Spirk, their attorneys; whereupon the following proceedings were had:

The case was submitted to the Court without jury;

whereupon Mr. Peterson made the following opening statement to the Court:

“Action by Pacific County and Glazebrook, treasurer, vs. Maryland Casualty Company (hereafter called the company) to recover on bond given by First International Bank of South Bend, Washington, in the sum of \$10,000 to secure deposits, and being executed as security by the bank, the bond being given for safe keeping of money by bank. Bond executed 9th day of July, 1915. Nineteenth of same month bank closed its doors. At that time county deposits amounted to \$52,497. Plaintiff prayed judgment for \$10,000. Answer in the main is a general denial, with two affirmative defenses. Application was made about the 9th day of July, and on the 10th or 11th the bond was mailed from Seattle to the bank at South Bend. (1)

WHEREUPON the following facts were admitted. The corporate existence of the parties. That Glazebrook was at all times treasurer of Pacific County. Books in the hands of the bank examiner were books of the bank. It was not admitted that the bank was county depository. That the bank was down until the 16th day of July, 1915, a going banking concern and doing a general banking business at South Bend. That a demand was made upon the defendant. Surety in a demand dated at South Bend, Washington, July 20, 1915. That proof of the claim of Pacific County was duly made to the [39] surety.

Testimony of J. L. Glazebrook, for the Plaintiff.

J. L. GLAZEBROOK, a witness on behalf of the plaintiff was duly sworn and testified as follows:

Here an objection was made by Mr. Roberts for defendant upon the ground that the complaint stated no cause of action.

Objection overruled and exception allowed.

“I received the bond on the 12th day of July, 1915, from Mr. Pierson, cashier of the bank.”

It was admitted that John I. O’Phelan was prosecuting attorney of Pacific County, and the signature of O’Phelan and myself were endorsed on the bond on the 12th of July, 1915.

The bond bears the following endorsement: In the Superior Court of Pacific County, Washington, July 19, 1915, C. B. Brown, clerk.

It was admitted that the bond was filed with the clerk on July 19, 1915.

“The bond was not in my possession after July 19, when it was filed with the clerk.”

Bond offered in evidence as Exhibit “3.”

Objection made by defendant and overruled and exception allowed.

“The amount in the bank on the 17th of July, 1915, the time of the failure was \$52,429.24.”

This was admitted to be a correct statement of the amount, but objection was made to its materiality.

Exhibit “4” being proof of claim and statement of daily balances, was here received in evidence.

(Testimony of J. L. Glazebrook.)

“I have been paid in the neighborhood of \$30,000 from other bond companies.”

This evidence was objected to and overruled and exception was allowed. [40]

“There is \$16,686 unpaid at this time; that is, computing interest on it. I was in the bank on the forenoon of July 17; I saw nothing unusual at the time. It was between ten and eleven o’clock. I don’t know whether anybody was cashing checks in there on the 17th or not. I didn’t learn of the bank’s closing until Monday morning. The regular closing hour of the bank on Saturday was twelve o’clock. The bank remained open until noon on Saturday the 17th.” (5-12)

Cross-examination by Mr. ROBERTS.

“The bank did not open on Monday the 19th. It was never opened after Saturday noon, July 17. Some time on Monday, after the closing of the bank Saturday, I filed the bond with the clerk. It has never been in my possession since. I knew the bond had to be filed with the county clerk. I wrote the letter, Exhibit “A.” While I have no independent recollection, I think I mailed it that day, because we always do.” (14-15.)

Letter was introduced as Defendant’s Exhibit “A.”

Objection was made, overruled and exception allowed. (16.)

“I stated in the letter that the prosecuting attorney had refused to approve of the bond. I expected,

(Testimony of J. L. Glazebrook.)

when I wrote the letter that the company would send a new bond. No new bond ever came. I saw O'Phelan on the 19th, the day the bond was filed. I took it up on the 19th with O'Phelan and Richardson. Richardson was deputy. I took it up with the prosecuting attorney's office on the . . .

I told the prosecuting attorney's office on the 19th that I had not yet filed it." (17-18.)

"It's awful hard for me to fix these dates without some date to go by. They came up there, to my office, on the 19th to make proofs of loss against the surety companies." (19.)

Q. "Then after you and the prosecuting attorney went over those securities, you went up and filed this bond of the Maryland Casualty [41] Company with the clerk? A. Yes, sir.

Q. That was after the county attorney had gone over with you, over all the securities you had?

A. Yes, it was in the process of going over the securities, of course."

(19.) "I hold in bonds and securities \$56,000 without the bond of the Illinois Surety which is for \$10,000. If that be added, then I hold \$66,000." (21)

"I have suit pending against Illinois Surety Company for \$10,000. I am giving the principal amounts of securities, without interest." (22)

"I give no notice to the company, except the letter of July 14th. The letter of July 14th constituted the sole and entire notice of any kind which I gave the Surety Company." (23.)

(Testimony of J. L. Glazebrook.)

The bonds and warrants have been mostly cashed."

Here it was admitted that Exhibit "B" was duly served upon Glazebrook upon the date it bears and exhibit "B" was admitted in evidence over objection, and exception allowed. (24.)

Redirect Examination.

"I did not file the bond with the clerk because the company had not sent me bond carrying the clause outlined. (25) If I had filed it, and the company sent me the bond carrying the clause outlined, it took an order of court to take this one, (indicating the bond sued on.) It required a cancellation notice of ninety days, and in that event I would have held two bonds against the company for ten thousand dollars each."

"In addition to local improvement bonds and municipal warrants, I had bond with Equitable Surety Company, \$5,000, Fidelity Deposit Company \$20,000, Aetna Accident and Liability Company \$5,000, New Amsterdam \$6,000, Illinois Surety Company \$10,000." (26-27.) [42]

Mr. ROBERTS.—"We cannot be liable for the full amount in this case in any event."

Mr. PETERSON.—"We contend, if there was less than \$50,000 which the treasurer had a right to take then we have a right to recover the full amount, if more than \$50,000 we are entitled to *pro rata* judgment."

Mr. ROBERTS.—"Witness has already stated that he has made some conditional settlement with

(Testimony of J. L. Glazebrook.)

some of the Surety Companies, awaiting the outcome of this suit."

"The amount of securities, including Illinois Surety Company, is \$66,000." (28.)

"I deposited \$4,000 on July 12, and \$4,000 on the 14th." (29.)

Mr. Roberts objected on the ground that the bond could not be made liable for any deposits made prior to July 19. Objection overruled, exception allowed. (29-30.)

Pass-book introduced as Plaintiff's Exhibit "4."

Objection by defendant overruled. (30.)

Subject to objection, it was admitted that the bond of the Illinois Surety Company was dated July 1, 1914, and by its terms made to expire July 1, 1915. (31.)

Bond of Illinois Surety Company offered in evidence. (32.)

Following was admitted over objection of Maryland Casualty Company.

"I was familiar with the terms of the bond of the Illinois Surety Company, and knew when it commenced, and when it expired. And my purpose in getting the bond sued on in this action was to cover deposits, because I had the expiration of the bond of the Illinois Surety Company in mind."

Glazewood was asked whether or not he would have deposited the \$8,000 [43] if he had not had the Maryland Surety Bond.

Objection was made and sustained. (34.)

(Testimony of J. L. Glazebrook.)

Recross-examination.

“The other surety companies paid me, and took a receipt on account of their *pro rata* share of the loss, pending the decision of the courts in these other cases. These payments were made for the purpose of stopping interest, and I issued them receipts on account.” (35.)

Redirect Examination.

“Actions are now pending against other companies. There was no compromise, release or discharge.” (36.)

Mr. Roberts, of counsel for defendant stated:

“I do not claim that our bond was released by payments made to the treasurer by other companies, and his giving them receipts on account. I stipulated that that might be done without prejudice to your legal rights.” (36.)

Testimony of Roy A. Langley, for Plaintiff.

ROY A. LANGLEY, called as witness for plaintiff, testified:

“Am special deputy bank examiner. I have the account of Glazewood, treasurer, with bank. July 13, \$4,000, was deposited, and on the 14th \$4,000 was deposited. There were no deposits on the 12th.” (39.)

“The bank’s books do not show a deposit of Four Thousand Dollars on the 12th, but it is the practice if a deposit is made late on one day, after the books are closed, to enter it on the books in the next day’s business.” (39.)

(Testimony of Roy A. Langley.)

Ledger sheet was here produced by the witness. The sheet admitted to be correct, but objection was made to its materiality and objection was overruled and it was admitted as plaintiff's Exhibit "36." (39.)

Exhibit "8" was over objection introduced showing entry on the books of the bank July 17. (41.)

Exhibit "9" were deposit slips showing deposits on July 17. (42.)

Received over objection and exception allowed. Exhibit "10" introduced over objection and exception allowed. Witness was asked the amount of money on deposit when the bank closed its doors. Objection was made and overruled and exception allowed and stated that it was around \$200,000. [44]

Cross-examination.

"The \$4,000 deposited on the 14th did not increase the deposits. At the close of business on that day deposits showed a decrease. There was a check for \$4,000 on that day. The next day it still showed a decrease. The first \$4,000 deposited did not increase the bank's liability." (45.)

"The \$4,000 is opposite the 13th of July. It belongs on the line of the 13th of July, but it should not belong there with the balance off on the other line. The only reason I say the \$4,000 is off the line is because I look at the opposite side of the balance." (46.)

"I heard rumor, that money taken in on the 17th was returned. It was understood I have heard

(Testimony of Roy A. Langley.)

people say that deposits were taken and returned, personally, I do not know. The records of the bank show that deposits were received on the 17th and that is all I know about the facts.” (47.)

Above evidence was received over objection.

“I did not go to the bank until about the 26th of July. I could not say when the affairs of the bank will be wound up. It is still indefinite as to when it can be closed.” (48-49.)

Redirect Examination.

Mr. PETERSON.—Subject to objection and exception counsel for defendant here admitted that Glazebrook, county treasurer, filed with the Board of County Commissioners of Pacific County a written designation of the bank as county depository on the second Monday of January, 1915.

Mr. ROBERTS.—“Yes, I make no further admission than that Mr. Glazebrook did file with the Board of County Commissioners on the second Monday in January a written designation of this bank as a county depository.”

Testimony of John I. O’Phelan, for Defendant.

JOHN I. O’PHELAN.

Direct Examination.

“I was on July, 1915, and prior thereto prosecuting attorney for Pacific County. John I. O’Phelan, upon the bond is my signature.”

Q. “Mr. O’Phelan, was that put on there before or after the name of [45] J. L. Glazebrook, county treasurer?”

Objection by defendant overruled.

(Testimony of John I. O'Phelan.)

A. "It was filed at the time of Mr. Glazebrook's signature." (52.)

"I recall the failure of the bank. I have not any distinct recollection of the time that this bond was approved, but after listening to Mr. Glazebrook's testimony,"—(interrupted).

Mr. ROBERTS.—"I object to that, if the Court please."

Objection sustained.

The WITNESS.—"I would like to say that I do not think that I approved the bond after the failure of the bank; I do not think I would do it, but I have not any recollection of having approved the bond after the failure of the bank."

Cross-examination.

(By Mr. ROBERTS.)

Q. "Well, now, Mr. O'Phelan, you stated now and I presume that is correct, that you have no recollection as to when you did approve it?"

A. No, sir, I could not say definitely when I did approve it.

Q. But you do remember, however, that when this bond was presented to you that you objected to the form of it?

A. Yes, I have a distinct recollection of that.

Q. And you at that time declined to approve it because it was different in form from the other depository bond?

A. Yes, if I may explain. That is true."

Mr. PETERSON.—Now make your explanation.

A. "The former prosecuting attorney had en-

(Testimony of John I. O'Phelan.)

deavored to procure a uniform bond, and it was with that end in view that I objected to the form of this bond, in that I wished in this bond to have a clause to provide that in case any of the other securities failed, that it would increase the liability of this bond so that the county would not lose by the failure of some securities that were [46] no good.” (53-54.)

“The clause which Glazebrook insisted must go into the bond is in substance what I stated must be contained in it.” (54.)

“I demanded this for the sake of uniformity in all the bonds. We were trying to get a uniform contract. I sent Mr. Richardson to the office of Mr. Glazebrook after the bank had failed.” (55.)

“All I was endeavoring to do was to get a *uniform* of bond, and notwithstanding that without that uniformity being in this bond I approved it.” (56.)

Testimony of J. L. Glazebrook (Recalled).

J. L. GLAZEBOOK, recalled.

“I did not ascertain whether certain warrants and local improvement bonds held by me as security had been passed upon by the Supreme Court.”

The evidence was received over objection and exception allowed.

“I did not mean to say that they had been unfavorably passed upon, simply that I did not know.” (59-60.)

Plaintiff rests.

DEFENDANT'S CASE.

Testimony of Arthur W. Whalley, for Defendant.

ARTHUR W. WHALLEY.

Direct Examination.

“Live in Seattle. Am agent for casualty department of Maryland Casualty Company. The company writes casualty bonds, likewise surety bonds. The two are written by different agents. My office did not represent the company's surety department. Calhoun, Denny and Ewing were agents in surety department.” (62.)

“I received the letter, Defendant's Exhibit “A,” in Seattle, Saturday afternoon, July 17th. I personally opened the letter and turned it over to Mr. Cathcart because he had been manager of our surety department. Surety offices close in Seattle at one o'clock on Saturdays.”

This evidence was objected to, and exception allowed.

“The letter was received after business hours on Saturday, but [47] I was still present in the office, as was Mr. Cathcart. The letter was delivered to Calhoun, Denny and Ewing, the Surety Agents, on Monday following. It was delivered to Mr. Cran at Calhoun, Denny & Ewing's office.” (63-64.)

“No, myself nor my office does not represent the Maryland Casualty Company in the surety department; when I said Cathcart was surety manager, I meant for another company; the Fidelity and Deposit Company.” (64-65.)

Testimony of John N. Cran, for Defendant.

JOHN N. CRAN.

"Calhoun, Denny and Ewing, in July, 1915, were agents of the surety department of Maryland Casualty Company, writing surety bonds and I was with Calhoun, Denny and Ewing. The bond in question, here, was written in Seattle in the office of Calhoun, Denny and Ewing." (65.)

Witness was handed letter, Plaintiff's Exhibit "A."

"I received that letter on Monday forenoon from Mr. Cathcart of Mr. Whalley's office; Monday forenoon, July 19. I never saw the letter prior to that time, and it did not come into my possession or the possession of Calhoun, Denny and Ewing, the surety agents' possession prior to that time." (66.)

Here counsel for defendant tried to prove by the witness, and then made formal offer to prove by the witness that the company carries the *pro rata* clause in all its depository bonds, and would not write any bond that did not carry that clause.

Objection was made and sustained, exception allowed.

Counsel then offered to prove by the witness that the request made by Glazebrook in the letter exhibit "A" would not have been granted, and that the company would not have changed nor modified the bond in any particular.

Objection sustained and exception. [48]

"The company received no premium for writing the bond." (66-67.)

(Testimony of John N. Cran.)

“Whalley’s office is not in the same building with the office of Calhoun, Denny and Ewing. The bond was mailed from Seattle to Pearson, cashier of the bank at South Bend.” (67.)

“The surety office of Calhoun, Denny and Ewing was closed Saturday afternoon, the 17th. I am not with Calhoun, Denny and Ewing now, nor with the Maryland Casualty Company. The bond was brokered to Calhoun, Denny and Ewing from John A. Whalley, who writes for the Fidelity & Deposit Company of Maryland. The notice from Glazebrook at South Bend instead of going to the office of Calhoun, Denny and Ewing went to the office of John A. Whalley & Company.” (68.)

Testimony of Arthur Whalley, for Defendant.
(Recalled).

ARTHUR WHALLEY, recalled.

“Our office brokered this bond to the Calhoun, Denny and Ewing office. It wasn’t written in the Fidelity & Deposit Company because the line was full.” (69.)

“I presume that our office delivered the bond to Pearson personally; I could not say.” (70.)

Testimony of C. O. Bates, for Defendant.

C. O. BATES, called by defendant.

“Attorney at law. Partner of Mr. Peterson, a counsel in this case.”

Witness then was asked if his firm was appearing

(Testimony of C. O. Bates.)

in this case as counsel for the Fidelity & Deposit Company of Maryland.

Objection was made.

Counsel for defendant company offered to show that the Fidelity & Deposit Company was on the depository bond for \$20,000 and that in addition thereto the Fidelity & Deposit Company was on the personal bond of Glazewood, treasurer, and that because of these interests the Fidelity & Deposit Company were employing counsel to defend this case, and that the Fidelity & Deposit Company had declined [49] to pay until such time as it could compel the Maryland Casualty Company to pay.

The objection was sustained by the Court and exception allowed.

Then counsel for the Maryland Company offered to prove by this witness that he and his partner were employed in the case by the Fidelity & Deposit Company of Maryland the same company which is on the bond of the bank for \$20,000 and likewise on the personal bond of Glazebrook as treasurer and that they appeared in this cause only as counsel for Fidelity & Deposit Company.

An objection was made to the offer and sustained.

Further hearing was had in the case by the Honorable E. E. Cushman, Judge; appearance as before.

It was admitted without admitting the validity of Maryland bond that the following is a list of securities held by Glazebrook, treasurer:

(Testimony of C. O. Bates.)

The Fidelity & Deposit Co....\$20,000

The Aetna Accident & Liabil-

ity Co. 5,000

Equitable Surety Co. 5,000

New Amsterdam Casualty Co. 6,000

The Maryland Casualty Co. ... 10,000

Municipal Bonds & Mort-

gages 10,525.65 (74)

Counsel for plaintiff offered in evidence complaint, demurrer, order and judgment of the Court sustaining the demurrer to plaintiff's complaint against Illinois Surety Company; to this counsel for defendant objected and the objection was overruled. (75.)

Counsel for plaintiff stated that the Illinois Surety Bond expired July 1, 1915, and that the Court had held that the liability of the Illinois Surety expired on July 1, 1915. (76.)

But the counsel for defendant stated that the bond was in effect at the time the majority of the monies were deposited in the bank. (77.) [50]

Here counsel for plaintiff asked Glazebrook what other securities he held, over and above the Surety Bonds, to which counsel for the defendant objected upon the ground that the only thing material was the amount of such securities.

Objection overruled and exception reserved. (77.)

Then counsel for plaintiff stated that Glazebrook held local improvement bonds of the city of South Bend \$2800 the validity of which had not been passed upon by the Supreme Court, and that such bonds

(Testimony of J. L. Glazebrook.)

could not be taken at their face value.

The COURT.—“Can the county sell its securities at a discount?”

**Testimony of J. L. Glazebrook, for Plaintiff
(Recalled).**

GLAZEBROOK testifies:

“I had warrants on various county and city funds, \$7,328; South Bend local improvement bonds, 2,888. Total \$10,519.95. The warrants have all been sold and the proceeds applied on the deposit. These warrants which have been sold and applied on the deposit amount to \$7,328.” (79.)

“I have drainage district warrants \$391.95. Their validity is in question. I have been unable to dispose of them at any price.” (79.)

“The \$2,800 on districts 98 and 96, South Bend; I sold the \$2,100 for 15¢ and the \$700 for 90¢. I made no investigation as to whether or not the validity of these warrants had been passed upon by the Supreme Court.” (82.)

“I did not request any lawyer to make the investigation.” (83.)

Cross-examination.

“The face value of all the municipal bonds was \$10,519.95. They are all bonds or negotiable instruments which provide for a certain definite, fixed sum of money. I do not contend that I sold any of these improvement bonds at a discount because of their invalidity.” (83.) [51]

(Testimony of J. L. Glazebrook.)

“I did not mean to say that they had been declared invalid. I remember Mr. Spirk being down to South Bend. I remember writing the letter introduced as exhibit ‘A.’ ”

Witness was asked if he did not tell Mr. Spirk that he did not approve the bond at the date he wrote the letter. (84.)

Objection was made to this question, and there was discussion and argument, in the course of which the following:

The COURT.—“I think there was a date on it, about when it was to be approved.”

Mr. ROBERTS.—“But that was the 19th, after the bank closed, and of course it could not be liable for any sum if it was approved that day.”

WHEREUPON, the Court decided to receive the evidence for the purpose, only, of throwing light upon the date of approval of the bond or for fixing the day when the bond became liable. (85.)

A. “No, sir, I did not make any such statement.

Q. You made no statement of that sort to him?

A. No, sir.”

Objection was made and overruled and exception allowed. (86.)

Testimony of John I. O’Phelan, for Defendant.

JOHN I. O’PHELAN, is asked if he ever investigated as to whether the \$2,800 of local improvement bonds had been passed upon by the Supreme Court.

Objection was made, and overruled and exception allowed.

(Testimony of John I. O'Phelan.)

Witness answered, he had, then stated that in his judgment the validity of the bonds had not been before the Supreme Court before the assessment-roll had been passed upon by the Supreme Court.

In the case of Vincent vs. South Bend, 84 Washington, 314.

Objection was made and overruled and exception allowed. (87.)

Witness stated in his opinion the validity of the \$391.95 issue had not been before the Supreme Court; this was likewise over-objectioned. [52]

Cross-examination.

Witness was handed the decision of the Supreme Court of Washington in Vincent vs. South Bend, 84 Washington, 314, and asked if the objectors did not raise every question in that case that they could raise, and stated that as he understood the history of the case and the decision of the Court, the contest was over the validity of the assessment-roll. (88.)

It was tide-land fill and a great many properties or property owners were included and there was a long list of objectors. Their objections were overruled and they took the case to the Supreme Court. (89.)

Testimony of George L. Spirk, for Defendant.

GEORGE L. SPIRK, testified.

"Went to South Bend to investigate failure of bank; while there had a talk with Glazebrook; in the conversation I asked him the date when he claimed to have approved the bond."

(Testimony of George L. Spirk.)

Objection was made, and overruled and exception allowed.

“I had a talk with him on the 23d of July, 1915. The bank examiner took charge, on Saturday, the 17th, and I was down there on the 23d, and the bank did not open on the 19th for business. I asked him, at that time, when the bond had been approved, and his statement to me bore out what his deputy had told me when I was down there on the 23d, and he said it was after the letter was written. I called his attention specifically to the letter, and he said it was after he wrote the letter, two or three days after the date of the letter, or thereabouts. In any event, it was after the letter was written by several days, that the bond was first approved.” (91.)

Cross-examination.

“I reported all these matters to Mr. Roberts before the trial. I have been in the State all of the time. I knew the bond was not [53] filed with the clerk until after the failure of the bank, and that was the very reason I wanted to find out when the bond was approved.” (92.)

**Testimony of J. L. Glazebrook, for Defendant
(Recalled).**

GLAZEBROOK, recalled.

“Including interest to date of the closure of the bank, I had on deposit, \$52,457.97. There has been no dividend declared. The County has received no money from the receiver.” (93.)

(Testimony of J. L. Glazebrook.)

The COURT.—“I find the liability to be \$52,-457.97, amount on deposit 17th of July. I eliminate the Illinois Surety Company. I hold that the face of all bonds, municipal, local improvement, warrants and district bonds are to be included at their face with the face of the various surety company bonds, exclusive of Illinois Surety in determining the *pro rata* liability. Liability on this bond is a matter of interpretation of a contract.” (94.)

“If you include amount realized on securities which treasurer had no business taking, there would be no way—you would be just chasing around in a circle. There would be no possibility of the liabilities being settled.”

Mr. ROBERTS.—“The way I understand it, no amount was fixed, at the former hearing, and the whole matter will date from the entry of the decree now, if we want to appeal; I want no misunderstanding about that—no decree of any kind has ever been entered?”

Mr. PETERSON.—“No sir.”

BE IT FURTHER REMEMBERED, that in due time defendant submits the foregoing as its proposed bill of exceptions herein, and prays that the same may be settled and allowed.

Dated this 4 day of January, 1917. [54]

JOHN W. ROBERTS,

GEO. L. SPIRK,

Attorneys for Defendant.

The foregoing bill of exceptions is presented in due time and is true and correct and the same may be settled and filed.

JOHN I. O'PHELAN,
BATES & PETERSON,

Attorneys for Plaintiff.

Now, on this 23 day of February, 1917, this cause coming regularly on to be heard on the application of the defendant to have its proposed Bill of Exceptions settled, signed, filed and made of record in said cause, the parties hereto appearing by their respective counsel, and it appearing to the Court that the foregoing Bill of Exceptions contains all the facts upon which said cause was tried before the undersigned presiding Judge upon the trial of said cause, and all the evidence and testimony offered upon the trial of said cause, and all objections made by counsel for the respective parties to the receiving or rejection of said evidence offered, and all the motions and the rulings of the Court thereon, and all exceptions taken at the time thereto, the said Bill of Exceptions has been examined and found correct, and contains all the material facts matters and proceedings, not already a part of the record in said cause, and is hereby settled, signed and ordered filed and made a record herein, all of which is accordingly done by the undersigned, the judge before whom the said cause was tried.

EDWARD E. CUSHMAN,

Judge of the United States District Court for the Western District of Washington, Southern Division. [55]

[Endorsed]: Defendant's Bill of Exceptions. Filed in the U. S. District Court Western Dist. of Washington, Southern Division, Jan. 4, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

Refiled as amended and certified in the U. S. District Court, Western Dist. of Washington, Southern Division, Feb. 23, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [56]

Petition for Writ of Error.

Now comes Maryland Casualty Company, defendant herein, and says:

That on the 5th day of December, 1916, this Court entered a decree herein, in which decree and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this defendant, and of which more in detail appears from the assignment of errors which is filed with this petition.

WHEREFORE, the defendant prays that a Writ of Error may issue in this behalf out of the United States Circuit Court of Appeals, Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the United States Circuit Court of Appeals.

JOHN W. ROBERTS,

GEO. L. SPIRK,

Attorneys for Defendant. [57]

Filed in the U. S. District Court Western Dist. of Washington, Southern Division, Jan. 4, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [58]

Assignment of Errors.

Comes now Maryland Casualty Company, a corporation, defendant, and assigns errors in the trial, decisions, rulings, orders and decree of the Honorable District Court in said cause, as follows:

1. The Honorable District Court erred in rendering judgment in favor of the plaintiff and against the defendant.

2. In holding, deciding and decreeing that the bond was a valid and binding obligation and in holding that said bond ever became the binding obligation of the defendant.

3. In holding and deciding that said bond became effective prior to July 19th, 1915, and in holding that said bond became effective as such prior to the date of its filing.

4. In holding and deciding that said bond had been legally and properly approved prior to the 19th day of July, 1915.

5. In holding and decreeing that said bond and the surety thereon was liable for moneys deposited in the bank prior to the execution and filing of the bond.

6. In holding and decreeing that said bond and the surety were liable for two deposits made on the 13th and 14th days of July, or any part of such deposits.

7. In holding and decreeing that said bond was liable in any event for more than its proportion of moneys deposited after July 12th, 1915, and in holding that said bond was liable for any of the moneys deposited after July 12th.

8. The Court erred in receiving any evidence touching any alleged loss of the plaintiff upon any date prior to the 18th day of July, 1915, and erred in receiving the evidence of Glazebrook, the plaintiff, that he deposited moneys in the bank on the 13th and 14th days of July, 1915. [59]

9. The Court erred in entering decree in favor of the plaintiff instead of entering decree in favor of the defendant.

10. The Court erred in overruling and denying the motion and petition of defendant for a new trial.

WHEREFORE, defendant prays that said judgment of the said Honorable District Court of the United States for the Western District of Washington, Southern Division, be reversed.

Dated this 4th day of January, A. D. 1917.

JOHN W. ROBERTS,
Attorney for Defendant.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jan. 4, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [60]

Order Allowing Writ of Error.

On this 4th day of January, 1917, comes the defendant, by its attorneys, and files herein and pre-

sents to the Court its petition praying for the allowance of a writ of error, an assignment of errors intended to be urged by them, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

ON CONSIDERATION WHEREOF, the Court does allow the writ of error upon defendant giving bond according to law in the sum of two hundred fifty dollars (\$250), which will operate as a bond for costs.

EDWARD E. CUSHMAN,

Judge.

[Indorsed]: Order Allowing Writ of Error. Filed in the U. S. District Court, Western District of Washington, Southern Division, January 4, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [61]

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that Maryland Casualty Company of Baltimore, Maryland, a corporation, defendant herein, as principal, and the United States Fidelity and Guaranty Company, a corporation, as surety for and on behalf of said Maryland Casualty Company are held and firmly bound unto PACIFIC COUNTY, a municipal corporation and one of the Counties of the State

of Washington, and J. L. Glazebrook, as county treasurer of said Pacific County, the plaintiffs herein, in the full and penal sum of twelve thousand dollars (\$12,000) to be paid to the said Pacific County, a municipal corporation and one of the counties of the State of Washington, and J. L. Glazebrook, as county treasurer of said Pacific County, their attorneys successors or assigns, to which payment well and truly to be made, we bind ourselves, our assigns, and successors, jointly and severally and firmly by these presents. [62]

Sealed with our seals, and dated this 5th day of January, in the year of our Lord, one thousand nine hundred and seventeen.

The condition of this obligation is such, that

WHEREAS, in the District Court of the United States for the Western District of Washington, Southern Division in the suit pending in said court between Pacific County, a municipal corporation, one of the counties of the State of Washington, and J. L. Glazebrook, as county treasurer of said Pacific County, plaintiffs, vs. Maryland Casualty Company, defendant, a judgment was rendered in favor of the plaintiffs and against the defendant and the defendant Maryland Casualty Company having obtained from said Court a Writ of Error to reverse said judgment in the above-entitled cause, and a Citation directed to said Pacific County, a municipal corporation, and one of the counties of the State of Washington, and J. L. Glazebrook, as county treasurer of said Pacific County, citing and admonishing them to be and appear in the United States Circuit

Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, in the State of California.

NOW, THEREFORE, if the above-named defendant, Maryland Casualty Company shall prosecute, said Writ of Error to effect and answer all damages and costs, if it shall fail to make good its plea then the above obligation to be void; otherwise remain in full force and effect.

MARYLAND CASUALTY COMPANY.

By JOHN W. ROBERTS,
Attorney.

UNITED STATES FIDELITY & GUAR-
ANTY CO.

By JOHN C. McCOLLISTER,
Its Attorney in Fact.

[Corporate Seal of the United States Fidelity &
Guaranty Company.] [63]

The above and foregoing bond approved this 11th
day of Jan., A. D. 1917.

EDWARD E. CUSHMAN,
District Judge.

Filed in the U. S. District Court Western Dist. of
Washington, Southern Division. Jan. 11, 1917.
Frank L. Crosby, Clerk. By F. M. Harshberger,
Deputy. [64]

*In the United States District Court for the Western
District of Washington, Southern Division.*

No. 1949.

PACIFIC COUNTY, WASHINGTON,
Plaintiff,

vs.

MARYLAND CASUALTY COMPANY, a Corpora-
tion,
Defendant.

Stipulation for Removal of Certain Exhibits.

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective attorneys, that the following original exhibits filed in the above-entitled court in this case may be forwarded to the clerk of the Circuit Court of Appeals in the appeal of the above-entitled cause as part of the record thereof:

Plaintiff's Exhibits #5 and #6.

Plaintiff's Exhibits #8, #9 and #10.

Dated this 9th day of January, 1917.

JOHN I. O'PHELAN,
BATES & PETERSON,
Attorneys for Plaintiffs.
JOHN W. ROBERTS,
Attorney for Defendant.

Filed in the U. S. District Court Western Dist. of Washington, Southern Division. Jan. 11, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [65]

Stipulation.

IT IS HEREBY STIPULATED that the bond of the Illinois Surety Company, Plaintiff's Exhibit No. 5; Ledger Sheet, Plaintiff's Exhibit No. 6; Entries July 17th, Plaintiff's Exhibit No. 8; Deposit Slips, Plaintiff's Exhibit No. 9; and Journal, Plaintiff's Exhibit No. 10, need not be printed in the record.

Dated this 4th day of January, 1917.

JOHN I. O'PHELAN,

BATES, PEER & PETERSON,

Attorneys for Plaintiff.

JOHN W. ROBERTS,

GEORGE L. SPIRK,

Attorneys for Defendant.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jan. 4, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [66]

Acceptance of Service.

We the undersigned attorneys for the plaintiff, Pacific County, a municipal corporation and one of the counties of the State of Washington, and J. L. Glazebrook, as treasurer of said Pacific County, do hereby admit service and receipt of copies of the petition for Writ of Error, Assignment of Errors, Order Allowing Petition for Writ of Error, Bond on Writ of Error, Writ of Error, and Citation on Writ of Error, and do hereby waive any other or further service of said matters.

Dated at Seattle, Washington, this 4 day of January, A. D. 1917.

JOHN L. O'PHELAN,
BATES, PEER & PETERSON,
Attorneys for Plaintiff. [67]

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jan. 4, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [68]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing is a true and correct copy of the record and proceedings in the case of the Pacific County, a municipal corporation and one of the counties of the State of Washington, and J. L. Glazebrook, as county treasurer of said Pacific County, Plaintiffs, versus Maryland Casualty Company, a Corporation of the State of Maryland, Defendant, as required by praecipe of counsel filed and shown herein, and as the originals thereof appear on file and of record in my office in said District at Tacoma; and that the same constitutes my return on the annexed Writ of Error herein.

I further certify and return that I hereto attach and herewith transmit the original Writ of Error

and original Citation, together with original Order Extending Time to File Return on Writ of Error; and that, under separate cover, duly certified, I am transmitting herewith the original exhibits called for in Stipulation of Counsel for removal of same herein.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges as incurred and paid in my office by and on behalf of the plaintiff in error herein, for making record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:— [69]

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate and return, 159 folios at 15¢ each.....	\$23.85
Certificate of Clerk to Transcript, 3 folios at 15¢ each.....	.45
Seal to said Certificate20
Certificate and Seal to original exhibits, 1 folio35

ATTEST my hand and the seal of said District Court at Tacoma, in said District, this 28th day of February, A. D. 1917.

[Seal]

FRANK L. CROSBY,
Clerk.

By F. M. Harshberger,
Deputy Clerk. [70]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 1949.

MARYLAND CASUALTY COMPANY, a Corpora-
tion of the State of Maryland,

Plaintiff in Error,

vs.

PACIFIC COUNTY, a Municipal Corporation and
One of the Counties of the State of Washing-
ton, and J. L. GLAZEBROOK, as County
Treasurer of Said Pacific County,

Defendants in Error.

Writ of Error.

United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States of America to
the Honorable Judges of the District Court of
United States for the Western District of Wash-
ington, Southern Division, GREETING:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which in said
Circuit Court of Appeals before you, or some of you,
between Maryland Casualty Company, a corpora-
tion of the State of Maryland, Plaintiff in Error, and
Pacific County, a Municipal Corporation and one of
the Counties of the State of Washington, and J. L.
Glazebrook, as County Treasurer of said Pacific
County, Defendants in Error, a manifest error hath
happened to the great damage of said Maryland

Casualty Company, a corporation of the State of Maryland, Plaintiff in Error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, State of California, in said Circuit, within thirty (30) days from date hereof, in said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable E. D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 4th day of January, A. D. 1917.

Attest:

[Seal] FRANK L. CROSBY,
Clerk of the United States District Court for the
Western District of Washington.

By F. M. Harshberger,
Deputy.

The foregoing Writ is hereby allowed.

Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Maryland Casualty Company, etc., Plaintiff in Error, vs. Pacific County, a Municipal Corporation, etc., Defendants in Error. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jan. 4, 1917. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

MARYLAND CASUALTY COMPANY, a Corporation, of the State of Maryland,
Plaintiff in Error,
vs.

PACIFIC COUNTY, a Municipal Corporation and
One of the Counties of the State of Washington, and J. L. GLAZEBROOK, as County
Treasurer of Said Pacific County,
Defendants in Error.

Citation.

United States of America,—ss.

The President of the United States, to Pacific County, a Municipal Corporation and One of the Counties of the State of Washington, and J. L. Glazebrook, as County Treasurer of Said Pacific County, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City

of San Francisco, in the State of California, within thirty (30) days from the date hereof, pursuant to a Writ of Error duly issued and now on file in the office of the clerk of the United States District Court for the Western District of Washington, Southern Division, wherein Maryland Casualty Company, a corporation of the State of Maryland, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why so much of the judgment rendered against the said plaintiff in error as in said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable E. D. WHITE, Chief Justice of the Supreme Court of the United States, this 4th day of January, 1917.

[Seal]

EDWARD E. CUSHMAN,
United States District Judge.

[Endorsed]: No. — United States Circuit Court of Appeals, for the Ninth Circuit. Maryland Casualty Company, etc., Plaintiff in Error, vs. Pacific County, a Municipal Corporation, etc., Defendants in Error. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jan. 4, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

[Endorsed]: No. 2947. United States Circuit Court of Appeals for the Ninth Circuit. Maryland Casualty Company, a Corporation of the State of Maryland, Plaintiff in Error, vs. Pacific County,

a Municipal Corporation, and one of the Counties of the State of Washington, and J. L. Glazebrook, as County Treasurer of said Pacific County, Defendants in Error, Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.
Filed March 3, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

No. —

MARYLAND CASUALTY COMPANY, a Corporation,

Plaintiff in Error,

vs.

PACIFIC COUNTY, a Municipal Corporation, of the State of Washington, and J. L. GLAZEBROOK, as County Treasurer,

Defendants in Error.

**Order Extending Time to File Return on Writ of
Error.**

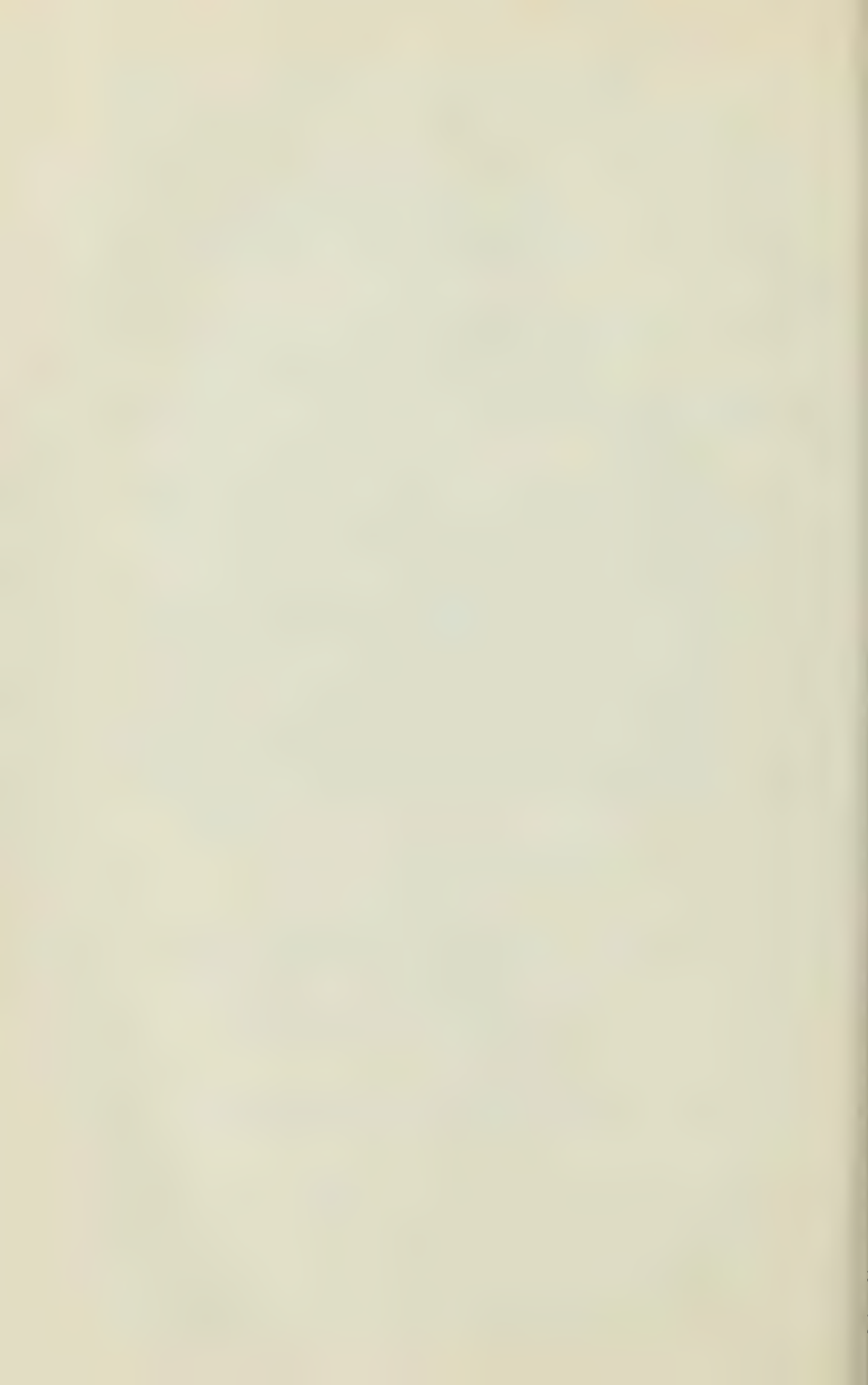
For a good cause shown, IT IS NOW ORDERED That the time within which the Transcript on appeal and return of the clerk of the United States District Court to the Writ of Error herein may be returned

and filed in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, be, and the same is hereby enlarged and extended to and including the 5th day of March, A. D. 1917.

Dated January 31st, 1917.

EDWARD E. CUSHMAN,
U. S. District Judge for the Western District of
Washington.

[Endorsed]: No. — In the United States Circuit Court of Appeals, for the Ninth Circuit. Maryland Casualty Company, Plaintiff in Error, vs. Pacific County et al., Defendants in Error. Order Extending Time to File Return on Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jan. 31, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.



No. 2947

IN THE 2

**UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MARYLAND CASUALTY COMPANY, a Corporation of the State of Maryland,

Plaintiff in Error,

vs.

PACIFIC COUNTY, a Municipal Corporation, and
One of the Counties of the State of Washington, and

J. L. GLAZEBROOK, as County Treasurer of said Pacific County,

Defendants in Error.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON,
SOUTHERN
DIVISION

HON. EDWARD E. CUSHMAN, Judge.

Brief of Plaintiff in Error

JOHN W. ROBERTS,

Attorney for Plaintiff in Error,

ROBERTS, WILSON & SKEEL,
Of Counsel.

1304 Alaska Building, Seattle, Wash.

No. 2947

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARYLAND CASUALTY COMPANY, a Cor-
poration of the State of Maryland,
Plaintiff in Error,

vs.

PACIFIC COUNTY, a Municipal Corporation, and
One of the Counties of the State of Washing-
ton, and

J. L. GLAZEBROOK, as County Treasurer of said
Pacific County,
Defendants in Error.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASH-
INGTON, SOUTHERN
DIVISION

HON. EDWARD E. CUSHMAN, Judge.

Brief of Plaintiff in Error

JOHN W. ROBERTS,
Attorney for Plaintiff in Error,
ROBERTS, WILSON & SKEEL,
Of Counsel.

1304 Alaska Building, Seattle, Wash.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARYLAND CASUALTY COMPANY, a Corporation of the State of Maryland,
Plaintiff in Error,
vs.

PACIFIC COUNTY, a Municipal Corporation, and
One of the Counties of the State of Washington, and
J. L. GLAZEBROOK, as County Treasurer of said
Pacific County,
Defendants in Error.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON, SOUTHERN
DIVISION
HON. EDWARD E. CUSHMAN, Judge.

Brief of Plaintiff in Error

The First International Bank was engaged in banking business at South Bend, Washington. J. L. Glazebrook was County Treasurer. The bank procured the Maryland Casualty Company as surety to execute a depositary bond to guarantee deposits to be made in the bank by Pacific County.

Such bond was executed over date of July 9th, 1915 by the bank as principal and Maryland Casualty Company as surety. (Tr. p. 811). The bond was executed at Seattle, about one hundred and fifty miles from South Bend, and mailed to the Bank. Glazebrook says the bond was delivered to him on July 12th. The statute requires the bond to be *filed with the County Clerk* after first being approved by two officers of the County. July 14th, Glazebrook addressed a letter to the Surety at Seattle saying that the Prosecuting Attorney and legal adviser of the County, and himself refused to approve the bond. (Tr. pp. 38 and 39). When this letter was mailed is uncertain, but it reached Seattle on Saturday afternoon, July 17th after business hours, and was on Monday, July 19th delivered to the agent who wrote the bond. The bank kept open its doors until noon on Saturday, July 17th. There is a dispute as to whether the Bank did any real business on Saturday, July 17th, but in any event, it never opened its doors after noon of Saturday, the 17th. Sometime during the day on Monday, July 19th, the bond was filed with the County Clerk, it being admitted that the bond was filed after the bank closed. When filed it had upon it an undated approval of Glazebrook and the Prosecuting Attorney. On Monday the 19th, the County had a balance in the Bank of \$52,457.97. Beside the bond of Mary-

land Casualty Co., the County held the following securities:

Fidelity & Deposit Co.....	\$20,000.00
Aetna Accident & Liability Co.....	5,000.00
Equitable Surety Co.	5,000.00
New Amsterdam Casualty Co.....	6,000.00
The Illinois Surety Co.....	10,000.00
Municipal Bonds & Mortgages.....	10,525.65
	<hr/>
	\$56,525.65

Or, in other words, the County held over and above the surety of Maryland Casualty Co., securities amounting to \$56,525.65. On each of July 13th and 14th, \$4000 was deposited but one \$4000 did not increase the amount, as a check for \$4,000 was drawn on same day (Tr. p. 53). The Illinois Surety Co. resisted payment and contemporaneously with this action suit was brought against it by the County. It is made to appear in this record over objection of Maryland Casualty that the Court held the Illinois Surety released. This action was brought by the County to recover \$10,000 the full amount of the bond. Judgment having gone for the County, defendant appeals:

SPECIFICATION OF ERRORS:

The Honorable Trial Court erred:

1st: In finding for the plaintiff and against the defendant.

2nd: In denying defendant's petition for new trial.

3rd: In finding and adjudging that the bond had been accepted by the County.

4th: In finding and adjudging that the bond was one to secure past deposits.

5th: In finding and adjudging that Section No. 8327 of Remington & Ballinger Code of Washington, is applicable to depositary bond.

6th: In finding and adjudging that the First International Bank had been properly designated as a County Depositary.

7th: In finding and adjudging that the surety was liable for any sums deposited prior to July 19th, or that the bond had been accepted prior to that date.

8th: In finding and adjudging that the bond became at any time a binding obligation upon the surety.

9th: In entering final judgment in favor of the plaintiff and against the defendant.

10th: In receiving evidence that the bond covered prior deposits and receiving any evidence under the complaint of any deposit made after the acceptance of the bond, and in receiving evidence of two deposits of \$4,000 each; in receiving evidence that any money was on deposit prior to the acceptance of the bond, because there was no such allegation in the complaint; and erred in receiving any evidence under the complaint, because the same stated no cause of action.

ARGUMENT

Session Laws, Washington, 1907, Chapter 51, page 74, Remington & Ballinger's Code, Sections 5072-5077 (Tr. pp. 28-29) provide:

(a) At fixed dates and such other times as may be deemed necessary, banks shall be designated by treasurer as depositaries. Such designation must be in writing and no treasurer shall deposit any public money in banks except as provided in the Act.

(b) Before designation shall *become effectual* and entitle deposits, the *bank* shall *within ten days* file with the *county clerk* a bond.

(c) Designation must fix the *maximum amount* of deposits to be carried in the bank.

(d) Bond must be approved by chairman of board, attorney and treasurer, or any two.

(e) Unless so approved bond shall not be *received or filed by the clerk*.

(f) Designation shall not become effectual until written contract is entered into for the payment of interest.

(g) Provisions of the Act shall in no way relieve or release treasurer from liability upon official bond.

The only evidence of designation of this bank as county depository is found in a qualified admission (Tr. p. 54). The admission is of the mere fact that Glazebrook did in January file a writing designating the bank. There was no admission that any such writing properly or duly executed was filed, and counsel for Surety was careful to state in the record that the admission went no further. There is no admission that it was in the form prescribed; no admission that it contains the requirements of the statute; no admission that any designation *was filed within ten days* of the execution and delivery of the bond as required by the statute. The dates show that this is impossible. The admission is of filing in January, while the bond was not filed until July. No admission and no showing that *maximum* amount was fixed. The burden was upon plain-

tiff to show the maximum amount of deposits this bank could receive and that such amount had not been exceeded. The surety could not be held for any amount above such maximum.

The trial court in his memorandum opinion quotes Section 8327 of the Code (Tr. p. 29) as being a part of the depositary statute, and at page 30 states that this section is applicable. The two statutes are entirely separate and distinct. One is under the head of "official bonds" and was enacted in 1890. The other is under the head of "county depositaries" and was enacted in 1907. The Official Bond Statute will be seen, from an examination of Remington & Ballinger's Code Vol. 2, Sections 8324-8335, to apply only to Fidelity Bonds of Public Officials. To illustrate: Glazebrook, the Treasurer, is under bond to Pacific County as Treasurer of the County. That is his official bond. The Depositary Statute, Section 5076, provides:

"The provisions of this Chapter shall in no way relieve or release the County Treasurer from any liability upon his official bond as such Treasurer, or any surety upon such bond, and shall in no way affect the duty of the several county treasurers of this state to give the bond as such treasurer now required by law."

This distinction becomes important because it is a vital part of the finding of the trial court. He states expressly in his decision:

“The last section quoted (that is Section 8327 from the official bond statute) is applicable to a bond of the depositary, such as the one in suit.”

The provision that within ten days of the designation bond shall be filed, is mandatory. The Treasurer shall deposit with any depositaries “which have fully complied with all requirements as herein provided” (Sec. 5076). The designation shall not become effectual until a written contract is entered into for the payment of interest (Sec. 5074); the language being “before any such designation or designations shall become effectual and entitle said treasurer to make deposits.” In other words, until the treasurer showed affirmatively that the law had been fully complied with, he had no right to deposit the money sued for in a bank, and if he had no right so to deposit it, then the bond which is liable is his *official bond as treasurer*, and not the depositary bond, and it should be immaterial to the treasurer which one of the bonds is pursued. The contract must require the bank to pay two per cent upon its average daily balances, and the contract must be approved by the Board of County Commissioners and the Prosecuting Attorney. The written designation must fix the maximum amount of deposits which is the full extent to which a surety may be made liable. There was abso-

lutely no showing made on the part of the Treasurer to the effect that he had any right to deposit any money in that bank, the admission being solely that six months prior he had filed some sort of written designation without admitting any of its provisions, or that it was either executed or filed in the manner provided by law.

The statute provides that moneys so deposited are “deemed to be in the hands of the Treasurer of the County”; that is to say, the County cannot suffer loss because the money is in the hands of the Treasurer and he has given the County an “official bond” to account for it.

BOND NOT EFFECTIVE UNTIL FILED

When this depositary law was first enacted, it read:

“The Bank shall give to the Treasurer a bond to be approved by the Treasurer.”

(Rem. & Bal. Code 3943).

This statute was amended to read as follows:

“Shall within ten days after such designation or designations have been filed, file with the County Clerk of such County a surety bond, which bond must be approved by the Chairman of the Board of County Commissioners, or Prosecuting Attorney and the County Treasurer, or any two of such officers.” (Tr. p. 28). This amendment is significant. The only re-

quirement under the old statute was to "give" a bond to the "Treasurer" to be approved by the Treasurer. In other words, the whole matter was left to the discretion of the Treasurer. The bond was given to the Treasurer and left with the Treasurer and required no approval except his. Under the statute as amended in 1907 the law makes it mandatory that the bond must be "filed with the County Clerk," not with the Treasurer. It does not go into the possession of the Treasurer but of the County Clerk, and is made an official document of the *County Clerk's* office. The approval is not left to the Treasurer, but must be approved by the Chairman of the Board, Prosecuting Attorney and Treasurer, or two of such officers. (There is a question under the language of this statute whether it does not mean that it must be approved by the Chairman of the Board and either the Prosecuting Attorney or the Treasurer. Plaintiff at first admitted this to be the proper construction, but later contended that any two of the three may approve it.) Therefore the Treasurer alone could not even approve this bond. This is not a bond *given by the Treasurer, but by the Bank*. The honorable trial court throughout seemed to treat this depositary bond as a bond given by the Treasurer. The language of the statute is:

“The Bank * * * shall file with the County Clerk of such county a surety bond. (Tr. p. 28).

It was the Bank which solicited this bond from Seattle. The surety sent the bond, not to the Treasurer but to the Bank. The law is perfectly clear. If the Bank desired to receive county deposits it was its duty to file the bond with the County Clerk. The Bank did not file the bond at all. For some reason unexplained in the record the Bank seems to have delivered the bond to Glazebrook. Glazebrook took it to the legal adviser of the County, and he refused to approve it, because it carried a pro rate clause to which he objected. The Bank conveyed to the Surety no acceptance of this bond. Neither did the County, nor anyone else, notify the Bank that it had been accepted. Glazebrook, who never had any right to possession of the bond, kept it until after the bank failed, and then took it up to the County Clerk's office and filed it. The file mark on the bond shows that it was filed on the 19th after the Bank had closed.

When, if at all, did this bond become effectual as a binding obligation upon the surety? Certainly not before its filing with the County Clerk; and it is not contended that the bond could be made liable *after the Bank had failed*.

Is there any question but that the Company could have withdrawn this bond at any time before it was filed with the Clerk?

No premium was paid on this bond and none became due from the Bank until the bond was filed. The Bank owed no premium until the bond was filed. There was no moment prior to the filing of this bond when the surety could have enforced collection of a premium from the Bank. Not only was there no premium paid, but none matured until the 19th, and on the 17th the Bank was closed. Had this bond been accepted and filed when the Bank received it on the 12th, the Bank would no doubt have paid the premium, before it closed.

The Bank never directed the bond to be filed. There is no evidence that the Bank ever consented to its being filed. If it was the fault or neglect of the County Treasurer that the bond lay around and was not filed, and that the Company was prevented from obtaining its premium upon the bond, then certainly the County or the Treasurer are estopped from asserting a claim upon the bond. If Glazebrook on the 19th, after the bank had closed, had destroyed the bond, there could be no recovery against the surety. Suppose Glazebrook on the 19th had returned the bond to the Company, certainly there could be no recovery upon the bond.

Glazebrook had no more right to file the bond on the 19th after the bank closed than he had to destroy it or to return it to the Company. The filing on the 19th after the Bank closed, without the knowledge or consent of the Bank, or the Surety, in no way gave binding force to the bond.

THERE WAS NO ACCEPTANCE OF THE BOND

Upon conditional guaranties, acceptance is always necessary to bind the surety. That the guaranty in this case is a conditional one is not questioned.

“It is eminently improper and ineffectual for the insured, holding a policy subject to his approval and final acceptance, if satisfactory, to accept the same after a loss has actually occurred. Finally it should be observed that there can be no legal delivery to the insured so long as there are unperformed conditions.”

Frost on the Law of Guaranty Insurance, Sec. 34.

“Again it may be observed there is no obligation resting upon the insurer to accept the proposal or application for guaranty insurance. Therefore, delay in acting thereon will not in itself warrant the presumption of acceptance. In brief, the proposal and application for insurance, whether they be oral or in writing, *must be accepted before* they become binding contracts. There must be an actual acceptance

thereof, some act to bind the insurer, or some act which must be done which is equivalent thereto, and from which the insurers cannot recede without liability.”

Frost, Sec. 22.

“In the federal courts and in those of a majority of our states, however, it is the established rule that where the guarantee is of a future credit *and is not signed at the request of the creditor or in his presence* and with his knowledge, or upon a valuable consideration moving from him to the guarantor or under seal, the latter is not bound from the *fact merely that the creditor makes advances* to the principal thereon, but from the further fact that the guarantor *has notice* within a reasonable time that the guaranty has been accepted, or, what is the same thing, that it has been acted upon, and the rule is ordinarily the same whether the offer is addressed to a particular person or generally, and whether it contemplates a single credit or a series of credits to the principal.”

Spencer on Suretyship, page 48, Sec. 38.

In this case the bond was not signed at the request of the county nor in the presence of any officer of the county; nor with the knowledge of any officer of the county. The bank alone solicited and procured the execution of the bond.

That guaranties are absolute and conditional see Spencer on Suretyship, Sec. 340.

“It is necessary to fix the liability of the guarantor that there should be notice of ac-

ceptance of the guaranty and notice of the principal's default."

Spencer on Suretyship and Guaranty, Sec. 340.

An averment in the complaint of due notice of acceptance from the guarantee to the guarantor is necessary.

Law of Suretyship, Spencer, Sec. 42.

It is enough that reasonable notice of acceptance is given. *Douglas vs. Reynolds*, 7 Peters, 113; *First National Bank vs. Carpenter*, 41 Ia. 518.

In the case here the first and only act that might be construed an acceptance by the county was the filing with the county clerk on the 19th, and that only upon the theory that the public record would be notice as no notice was given the Company.

"Where a guarantor signs the guaranty without request of the guarantee, and in his absence, for no consideration except future advances to be made to the principal, the writing is a mere proposal, requiring acceptance and notice thereof to the guarantor in order to bind him. The mere recital of a nominal consideration, without stating whether it comes from the guarantee or the principal, does not effect this rule." Syllabus.

Barnes Cycle Co. vs. Reed, 84 Fed. 603.

The following is from the syllabus of *Davis vs. Wells*, 104 U. S. 159:

“If made at the request of the guarantee, the guaranty becomes the answer of the guarantor to a proposal, and its delivery to the guarantee or for his use completes the communication between them and constitutes a contract. The same result follows where the agreement to accept is contemporaneous with the guaranty and constitutes its consideration. It must be so wherever there is a valuable consideration other than the expected advances to be made to the principal debtor, which, at the time the undertaking is given, passes from the guarantee to the guarantor; and equally so where the instrument is in the form of a bilateral contract, which binds the guarantee to make the contemplated advances, or otherwise creates by its recitals a privity between him and the guarantor. In each of these cases, their mutual assent is either expressed or necessarily implied.”

In *Davis Sewing Machine Company vs. Richards*, 115 U. S. 524., at page 527, the Court said:

“A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter’s agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the

delivery of the guaranty to him or for his use completes the contract. But if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract.

“The case at bar belongs to the latter class. There is no evidence of any request from the plaintiff corporation to the guarantors, or of any consideration moving from it and received or acknowledged by them at the time of their signing the guaranty. The general words at the beginning of the guaranty, “value received,” without stating from whom, are quite as consistent with a consideration received by the guarantors from the principal debtor only. The certificate of the sufficiency of the guarantors, written by the plaintiff’s attorney under the guaranty, bears date two days later than the guaranty itself. The plaintiff’s original contract with the principal debtor was not executed by the plaintiff until after that. *The guarantors had no notice that their sufficiency had been approved, or that their guaranty had been accepted, or even that the original contract had been executed or assented to by the plaintiff, until long afterwards, when payment was demanded of them for goods supplied by the plaintiff to the principal debtor.*”

The County Clerk is the one who passes upon and determines the sufficiency of the approval, be-

cause the bond shall not be "*recorded or filed*" by him unless "*so approved.*" The treasurer is given no right or power to accept the bond.

NO SUFFICIENT PROOF OF APPROVAL PRIOR TO FAILURE OF BANK.

(a) The approval is without date. This approval should bear the written date when it was made; it was omitted. This is significant.

(b) July 14 the bond had not been approved and the prosecuting attorney and treasurer had refused and rejected the bond because of its form. (Tr. p. 27).

(c) This bond was not approved until the 19th, after the bank had failed.

The honorable trial court at page 33 of the Transcript, suggests an inconsistency on our part in contending that the treasurer had no authority to accept the bond, but could reject it. His Honor failed to perceive our point. The rejection was by the prosecuting attorney, who by law is made the "legal adviser of the county," and by the treasurer.

"The prosecuting attorney refuses to approve any bond carrying the pro rata clause, and we ask you to kindly give us a bond in which this item is eliminated, or followed by the following." (From Glazebrook's letter.)

The prosecuting attorney was a witness in the case and testified that he did refuse to approve it. (Tr. p. 55). An alternative proposition was likewise submitted to the Company; that is to say, it must eliminate the pro rata clause or insert a provision which the prosecuting attorney prepared. Certainly the prosecuting attorney had a right to reject the bond, and no officer of the county would accept the bond without it first having the approval of the prosecuting attorney. So, the bond was rejected by both the treasurer and the prosecuting attorney; and it is now contended that those two officers had a right to approve it, and it is their names only which appear without date upon it. If they two had a right to approve they had a right to reject.

But underlying that question is our contention that the bond *was not accepted*. It is not so much a question of whether or not there was an affirmative act of rejection, as it is whether or not it was properly approved and accepted by anyone who had a right to so approve and accept it at any time prior to the 19th. It stands undisputed that both the treasurer and the prosecuting attorney did at one time affirmatively reject it. Having thus rejected the bond they could not, without notice, change their minds and accept it. Since it is the

bank that must procure and file the bond with the county clerk, and the county clerk must determine whether or not it has been properly approved before he is allowed to file it, and since the bank did not present it for filing, *it could not have been approved prior to July 19th* and therefore not accepted.

There was no privity between the surety company and the treasurer as an individual. The bond should have been returned to the bank, and the bank in turn have taken it up with the surety, because the surety dealt only with the bank.

The prosecuting attorney refused to testify when he placed his name on the bond. We submit that this is a very telling circumstance. Mr. O'Phelan simply took the position that he did not remember (Tr. pp. 54-56). It is passing strange that in a matter so important as a bond for \$10,000, and one on account of which a question was raised at the time, that the prosecuting attorney should not remember when he approved it. We believe the fact to be that Mr. O'Phelan did not want to swear falsely, and he did *not* want to *swear* against his county, and therefore he stood neutral. Glazebrook testified that he approved it on the 12th, the very day he says the bank delivered it to him; but on the 14th he wrote a letter over his own signature, saying not

only that it was not approved, but was rejected (as we construe the letter). Glazebrook's memory was fresher when he wrote that letter than it was a year later. Mr. Spirk testified that Glazebrook told him that he did not approve the bond until after the date of the letter. "I called his attention specifically to the letter and he said it was after he wrote the letter." (Tr. p. 65). Spirk was there for the purpose of investigating this very matter, and made note of it at the time.

O'Phelan testified that he sent his deputy, Richardson, to the office of Glazebrook *after the bank had failed*. (Tr. p. 56). Glazebrook testified as follows:

"I stated in the letter that the prosecuting attorney had refused to approve of the bond. I expected, when I wrote the letter that the company would send a new bond. No new bond ever came. *I saw O'Phelan on the 19th, the day the bond was filed*. I took it up on the 19th with O'Phelan and Richardson. Richardson was deputy. I told the prosecuting attorney's office on the 19th that I had not yet filed it." (Tr. pp. 48-49).

"Q. Then after you and the prosecuting attorney went over those securities, you went up and filed this bond of the Maryland Casualty Company with the clerk?

A. Yes sir.

Q. That was after the county attorney had

gone over with you, over all the securities you had?

A. Yes; it was in the process of going over the securities, of course." (Tr. p. 49).

"I give no notice to the company, except the letter of July 14th. The letter of July 14th constituted the sole and entire notice of any kind which I gave the surety company." (Tr. p. 49).

The prosecuting attorney says that after the bank failed on the 19th he sent his deputy up to see Glazebrook about the securities which the county held. Glazebrook says: "I saw O'Phelan (the prosecuting attorney) on the 19th;" O'Phelan says he saw Glazebrook about the securities on the 19th, and it was in the process of going over the securities that he saw O'Phelan. That is to say, Richardson, the deputy, went up to look over the securities and discovered that the Maryland bond had not been approved, so O'Phelan was sent for and approved it. Following this conference Glazebrook testifies he went in person to the office of the clerk and filed the bond, and then it bore the signatures of Glazebrook and O'Phelan with no date, and it follows as night the day that they put their signatures on the bond at that time, just before they filed it. The testimony of both O'Phelan and Glazebrook shows conclusively that the first time it was determined to file the bond was there on the 19th when

they were going over the securities to see what they held. Glazebrook testified:

"I did not file the bond with the clerk, because the company had not sent me bond carrying the clause outlined." (Tr. p. 50).

Therefore failure to file the bond was no oversight. It was deliberately withheld and not approved.

The honorable trial court, in his memorandum decision, said:

"The treasurer made \$8000 deposits which he could not legally make without the bond."

We direct your Honor's attention upon this point to the fact that Glazebrook was asked whether or not he would have deposited the eight thousand dollars if he had not had the Maryland Surety bond. Objection was made and sustained by the court. (Tr. p. 51). In other words the court would not allow Glazebrook to answer the question as to whether or not he deposited because of this bond, when he may have said that he would. But in the opinion asserts that Glazebrook did deposit it because he had this bond. Without the bond of the Maryland he still had securities in excess of the whole amount on deposit. If the bond of the Illinois Surety is counted, which we insist for the purpose of fixing liability it must have been, for the county at that

time was insisting upon the validity of the Illinois Surety Bond and prosecuting suit upon it, there is not the slightest evidence to the effect that he made any deposit upon the strength of this bond. There should be no such presumption, when he held other securities in excess of the deposit, and when the Maryland bond had neither been approved or filed.

In the face of all the circumstances and in the face of his own letter over his own signature that Glazebrook had not approved or filed the bond on the 14th, it should be assumed that Glazebrook did put his name on it on the 12th, that was not an approval of the bond, because Glazebrook could not alone approve it. It took also the approval of the prosecuting attorney, and then it must be finally *approved by the county clerk.*

BOND NOT RETROSPECTIVE.

Our contention is that this bond in no event could be held for money on deposit prior to the time of its acceptance.

(a) The complaint alleges that the bond was given to secure money *to be deposited*. (Tr. p. 4).

(b) The language of the bond precludes all idea that it was meant to be given to secure prior deposits.

(c) The authorities outside of three cited by counsel under an entirely different statute, are to the contrary.

The sole and only allegation contained in the complaint as to moneys to be secured, is found in paragraph IV and reads:

“County’s moneys and funds ‘to be deposited’ in the said First International Bank.”

That can mean only moneys thereafter to be deposited. The bond provides with reference to funds “to be deposited in the said bank, the amount whereof shall be subject to withdrawal.” (Tr. p. 9). That is to say, the moneys *to be deposited* shall be subject to withdrawal; not moneys which have heretofore been deposited. “Whereas the said bank in consideration of *such* deposit,” that is the deposit to be made referred to above. “A part of *such* deposit;” still no reference to any past deposit. “Shall well and truly keep all *such* sums of money so deposited or to be deposited as aforesaid.”

The honorable trial court was governed, as appears from his memorandum decision, by the words “so deposited,” and says otherwise such words are meaningless in the bond. But to us it is entirely clear that “so deposited” refers back to the words “to be deposited.” After the use of the words “to be deposited,” every future reference is to the

words "to be deposited." This is made perfectly clear by what follows.

"*As aforesaid.*" "As aforesaid" can mean only the words "to be deposited"—"so deposited" or "to be deposited as aforesaid" can mean only the money *to be deposited* after the giving of the bond. Again, the bond provides that the county is to be held harmless "by reason of the making of said deposit or deposits" making it clearly refer to the agreement in the bond that it is moneys to be deposited; otherwise the bond would have said "moneys now on deposit," or "moneys having been deposited prior to the execution of the bond." Counsel cite *Myers vs. Board of Commissioners*, 56 Pac. 11; *Brown vs. Board of Commissioners*, 50 Pac. 888; but the Kansas Statute makes the bank a county depository and compels the treasurer to deposit all money therein daily. The treasurer has no discretion, and if the bank fails the treasurer is released. He assumes no obligation. Under the Washington Statute he can keep the money where he pleases. He can put it in his stocking if he likes. The Statute expressly provides that the money is considered to be *in the hands of the treasurer*, and that the treasurer shall not be released upon his *official bond*; not his depository bond. The statute cited by the court upon official bonds has no

application. This bond has no language in it that may be construed to be a guaranty against any default of the treasurer, nor for neglect, malfeasance or wrong doing, and it is therefore in no sense under our statute an official bond of the treasurer or to the treasurer, but his official bond is made expressly liable for the money.

Therefore the Kansas decisions have no application. Counsel cited *Buhrer vs. Baldwin*, 100 N. W. 468. There the act made it the duty of the county treasurer to deposit daily his entire receipts, and in that case is this language:

“If this suit is to be regarded as the personal suit of the county treasurer, who has violated the statute, there would be great force in this contention.”

It is a little difficult to tell who is the plaintiff in the case at bar. It was brought jointly by the treasurer and the county. The treasurer is the most interested because he is liable to the county upon his official bond, and the Michigan case intimates that if he were prosecuting the suit he would be estopped, just as we are urging that Glazebrook is estopped here. As to Pacific County, it is not so much a question as to what Glazebrook did or failed to do, as it is a question of *when*, if ever, Pacific County, its clerk, or its board of county commissioners, ac-

cepted this bond. The Kansas statute reads.

“In all counties having a population of less than 25,000 inhabitants the county treasurer shall deposit daily all public money in some responsible bank or banks located at the county seat, to be designated by the Board of County Commissioners.”

It is further provided that the *board* shall take the bond.

All that is required under the Washington Statute is that any bank which desires to become a county depository must upon its own initiative, and at its own expense, give bond, and when it has done so it is qualified to receive deposits, if otherwise properly designated. In larger cities where there are several banks all qualified as county depositories, public officials, may deposit in any one or in all of them, or in a tin can.

Pingrey on Suretyship and Guaranty, page 83, 349.

National Bank of Commerce vs. Rockerfeller, 174 Fed. 22.

“A guarantee may be retrospective in its operation as to embrace debts or contracts where it appears that such was the intention of the parties, *but such construction can only be given to a guarantee where by express words or by necessary implication it clearly appears to be the intent of the parties to embrace past contracts.*”

Pingrey on Suretyship and Guaranty, Sec. 339.

“Commercial guaranties are in extensive use and should receive the liberal construction that is given to other contracts. In such construction technicalities should be excluded and the intention of the parties as it may be gathered from all parts of the contract should prevail. *The guarantor’s liability must not be enlarged by implication.*

Pingrey, Sec. 356.

“It is a rule of very general application that all guaranties are prospective and not retrospective in operation unless the contrary appears by express words or by necessary implication.”

174 Fed. 22 *supra*.

Counsel cited *Kephart vs. Buddecke*, 80 Pac. 501. We find in that decision the following language: “And whereas large sums of money have accumulated in the City Treasury which have been so deposited and which may continue to so accumulate.” (From the recitals in the bond, 80 Pac. 502.)

Therefore, in the Colorado case the bond expressly recited that it was given to secure money already on deposit, as well as that to be deposited. The court said the answer to the question as to what funds were secured by the bond, must be found in the recitals and conditions of the instrument. (page 503). Our recital, instead of being for moneys accumulated, says *moneys to be deposited*, and we be-

lieve this case to be authority for our contention. Furthermore, the recitals in the bond at bar, referring to funds, says: "current funds." It is "current funds" which "*shall be subect* to withdrawal," not "*are subject* to withdrawal." "Current funds" can mean only funds contemporary with the bond.

The words "so deposited" on which the trial court based his decision on this point, are nowhere contained in the recitals or whereases of the bond, and under the Colorado case the words referred to in the conditions must be construed as relating back to the recitals, and when you read the recitals in our bond there is not a word in the past tense; no word referring to the past; not a single recital that the treasurer had ever placed a single penny on deposit in that bank at the date of the bond. The Surety had no knowledge that Glazebrook had made prior deposits and it need not inquire because its bond was not made to guarantee such. Under the law, the bank could only have become a legal depository ten days prior to acceptance of the bond, yet, the decision here would make it liable for monies deposited a year before. The language used in the analysis of the bond provision in the Colorado case, is most persuasive here.

The probabilities are all against any such construction as is now contended for and it is proper

for the court to consider the probabilities.

Wheeler vs. Buck, 23 Wash. 679; 63 Pac. 566;
Pederson vs. Parks, 68 Wash. 482; 123 Pac.
 777.

Is it at all probable that this surety was agreeing for a nominal premium to become liable for an existing indebtedness of fifty-two thousand dollars (\$52,000)? Was it for such nominal consideration to become liable for the payment of a debt of another already contracted?

The complaint in the case nowhere alleges that any money was on deposit at any time prior to the 19th day of July. The allegation is that on said 19th day of July, 1915, there was actually on deposit in the said First National Bank, a banking corporation, the said county depository, the sum of \$52,497.97. (Tr. p. 4). There is no allegation that the bank had any money on deposit on the 17th, the day the bank closed, or at the date the bond is alleged to have been approved, or at any date prior to the 19th, and there is no evidence of that fact. We objected to any evidence under the complaint upon the ground that the only allegation as to funds was as to money "to be deposited," and that no allegation was made that any were deposited prior to the 19th.

No application was made to amend, and we

moved for judgment at the close of plaintiff's evidence on the ground that the complaint stated no cause, and that the evidence proved none, and we submit that this court can now consider only such evidence as was properly received under the complaint.

The complaint nowhere alleges the filing of the bond or when it was filed; it nowhere alleges its approval or that it ever was approved; it nowhere alleges an acceptance or any notice of acceptance, and we submit that our objection to evidence under this complaint was well taken and that our motion for judgment at the close of the evidence should have been sustained.

In *St. Louis County vs. American Loan & Trust Company*, Minn. 69 N. W. 704, the bond recited that the trust company "*has been* duly designated a depository," and was conditioned that the trust company shall well and truly pay over on demand according to law all of said funds which shall be deposited. The court said:

"It must be held from the complaint that the County Treasurer deposited County funds with this trust company before the date of the execution of the bond and before there was any shadow of claim that the trust company had been designated as a depository at all. We cannot hold that this bond secures the repayment of such funds."

And further,

“There is no allegation in the complaint that the trust company ever was designated a depository unless the recital in the bond so set out as an exhibit in such an allegation. Said Section 730 provides: ‘Before any national, state or private bank or banker shall be designated as such depository such bank or banker shall deposit with such treasurer a bond payable to such County and signed by not less than five free-holders of the state as sureties, which bond shall be approved by the Board of County Commissioners.’ This requires that the bond so approved shall be deposited with the County Treasurer before the depository is designated. In view of this statute we cannot hold that such recital in the yet unapproved and inchoate bond that the trust company has been duly designated a depository, etc., is a sufficient allegation in the complaint that it has been so designated.”

In *Kuhl vs. Chamberlain*, Ia., 118 N. W. 776, the law as to designating depositories and filing bonds was not complied with by the Treasurer who sought to enforce the bond as a common law one. The Court said:

“The bond having been delivered to the plaintiff there was sufficient appearing upon its face to put him upon inquiry and to charge him with notice that it was intended as a statutory bond. He could not by his own failure to approve and by his own failure to present it to the board of supervisors for approval, convert it from the one class to the other to his own

private benefit. * * * It will not do for us to say, therefore, that we depart from the terms of the bond and hold the surety liable to the plaintiff as for failure on the part of Green (the depository) to pay a private debt to the plaintiff simply because the funds deposited lost their public character and because the plaintiff in dealing with Green lost his official character through his own failure to comply with the requirements of the law.”

CONSTRUCTION

While a compensated surety is not allowed to enforce the old rule of *strictissimi juris* as applied to voluntary sureties, the contract of a compensated surety is still to be construed as any other contract, and may not be extended by implication.

Pingrey on Suretyship & Guaranty, 78-371.

Our own Supreme Court has adopted this doctrine, in *Black Masonry & Contract Co. vs. National Surety Co.*, 51 Wash. 471.

“It has been said in many of the older and a number of modern decisions however, and has been reiterated by text writers, that the undertaking of a guarantor or surety is *strictissimi juris*, and that a strict construction in favor of the guarantor or surety of the language employed should be adopted and all doubts resolved in his favor. In spite of this it is the better and practically universal modern opinion, that the words used in such a contract

should be construed the same way as the words used in other contracts, reasonably and with a view to ascertaining the true meaning, and intention of the parties, and that the same rules should be applied as in ascertaining the meaning of the language employed as in other cases of doubt and dispute. And it has recently been said that the rule of *strictissimi juris* as applied to contracts of suretyship is a rule for the application of such contract after their meaning has been ascertained and not properly a rule of construction at all. In other words, the meaning of the language actually used in such contracts is to be ascertained by the same rules and principles and with reference to the same extrinsic facts and circumstances as is the meaning of any other contract, but when the meaning of the terms employed has been thus ascertained, the surety has a right to stand upon the strict terms of his undertaking, which will not be extended by implication to persons, subject matters, or periods of time not embraced within those terms. He is not liable upon any implied engagement where a party contracting in his own interest might be, and has the right to insist on the strict performance of any condition for which he has stipulated, whether others would consider it material or not, and the contract is not to be extended to any other subject, to any other person, or to any other period of time than is expressed or necessarily included in it." Spencer on Suretyship, Sec. 90.

Authorities cited by counsel are cases where the bonds had been given long prior to the failure, and the questions discussed were whether or not the

bonds were valid or invalid. In bonds as other contracts there must have been a meeting of the minds.

Here we urge a decision of the question of whether or not this bond can be held liable when it was not filed or accepted until subsequent to the failure of the bank. There never was a meeting of minds upon the conditions of the bond. Counsel cited no authority upon the question of whether or not this bond became effective as such prior to the 19th. No authority is presented upon the question of whether or not the minds of the surety and the county ever met upon this contract, it having once been rejected as written. Surely they did not prior to the 19th. Had this bank failed nine or ten months subsequent to the time of filing the bond, and it had remained on file during that time without any objection on the part of the surety, and deposits in the meantime had been made, some of the authorities cited would be in point, but that is not the question involved here.

Mr. Whalley testified that he received the letter of the 14th in Seattle on Saturday afternoon, July 17th, after business hours. (Tr. p. 57). He gives the circumstances, account of which he especially remembers the fact.

Mr. Cran testified that Calhoun, Denny and Ewing received the letter on Monday the 19th (Tr.

p. 58). Whalley says he sent it to them and they were the agents who wrote the bond. Calhoun, Denny & Ewing sent it to counsel for the company, and thereupon the company immediately notified Glazebrook that it would not execute a bond without the pro rata clause.

Plaintiff in the lower court admitted that if filing was a prerequisite that this bond was not filed within time, but he treated the matter as though we were urging a defect in the filing. It is not a question of whether or not the filing itself was informal or defective, but the question is whether or not, the bank having failed prior to the filing and approval of the bond, the surety may still be held liable. While we urge the proposition that this bond was never legally approved or accepted, yet if the court shall find it was, then the question is *when was it accepted and filed?*

There could be no estoppel as against the surety so long as the contract was executory. This contract was executory until filed with the Clerk. There could be no estoppel prior to the 19th.

JUDGMENT EXCESSIVE

If the court should determine that this bond became effective prior to July 19th, we still submit that the bond could in no event become liable for

more than its pro rata share of \$8000. We objected to the introduction of the evidence showing a deposit of \$4000 on the 13th and \$4000 on the 14th, because there was no such pleading. A \$4000 check was drawn on the 14th, so that the amount was not augmented, but if the court shall hold that it was proper to receive evidence of these two deposits, we submit:

First. That only the one deposit for \$4000 can be considered, because the other was checked out on the same day; and

Second. That if the court considers the deposit to have been increased by the entire \$8000, then this surety could be held only for its pro rata share of \$8000.

The language of the bond is: "The surety shall only be liable for such proportion of the total loss or damage sustained by such obligee, by reason of any default of the principal embraced within the terms of this bond, as the penalty of this bond shall bear to the total sum of all bonds and securities which may be given to secure the deposits above referred to." "Above referred to" are monies "to be deposited."

At the time, the county held bonds and securities of the face value of \$66,000, and we still insist that since the county asserted claim against the

Illinois Surety, and was suing it at the same time, its bond should be counted; but even if the court eliminates the bond of the Illinois Surety, in no event should the judgment against the Maryland be more than 10/56 of \$8000.

Following is our comment upon cases cited in the memorandum opinion of the trial court:

Board of Commissioners vs. Duluth, 77 Northwestern 815. Case not in point. It held merely that when the Treasurer loaned money on a time Certificate of Deposit at 3% without any authority, the money to all intents and purposes was deposited on demand at 2% and therefore within the provisions of a bond securing such demand deposits.

People vs. Edwards, 9 California 286.

This case is not in point. It involved simply the meaning and construction of a Sheriff's official bond. There was no question of a *depository* bond.

Deerlodge County vs. U. S. F. & G. Co., 112 Pac. 1060.

This case involved the *official* bond of a County Treasurer. Defects in the approval of this bond were held not material under a statute similar to Rem. & Bal. 8327. There was no question of a *depository* bond.

Buhrer vs. Baldwin, 100 Northwestern 469.

This was a suit on a depositary bond. It was contended that the surety never received notice of acceptance of bond. The court said:

“We think the true theory upon which guarantors are entitled to notice of acceptance is that their undertaking is a mere offer and does not become a binding contract until such notice. See *Davis vs. Wells*, 104 U. S. 159, 26 L. Ed. 68.

“It results from this theory that guarantors are entitled to notice of acceptance only when their undertaking can be construed to be an offer of guaranty. *When, however, the undertaking recites a consideration*, though, as in this case, that consideration is merely nominal, conclusive evidence is furnished that the *guaranty has been made with the assent of the obligee* communicated to the guarantors, and *in such cases* notice of acceptance is unnecessary.” (Italics ours.)

Clearly the case at bar is not such a case as *Buhrer vs. Baldwin*. Here the bond did not recite a consideration, nor is there any showing that the guaranty was made with the assent of the obligee communicated to the guarantors.

Keppeart vs. Buddecks, 80 Pacific 501.

The bond was held to include present as well as future deposits, but only because of the preliminary recital, “Whereas, large sums of money *have accumulated* in the State Treasury which *have been*

so deposited (in divers banks). The court said, "The undertaking was prefaced by a recital of deposits *previously* made in divers banks. The bank could not keep money which it did not have. The money which it was bound to keep must, theretofore have been deposited with it, and as the only recital which gives the undertaking any intelligibility refers to "divers banks," the implication that the Bank of Montrose was one of the "divers banks" assumes the character of certainty."

Very different is the recital in the present case, that "Whereas, the International Bank has been designated as a depositary of funds *to be deposited*."

Meyers vs. Board of Commissioners, 56 Pac.
11.

In this case, the recital was "Whereas, said bank has been designated as a depositary * * * if the said bank, so long as it shall remain the depositary, shall promptly pay *any and all of said funds*." There are no such retrospective words as "*any and all of said funds*" in the case at bar.

Brown vs. Board of Commisisoners, 50 Pac.
888.

In this case, the condition of the bond was that "If the bank shall promptly pay *any and all deposits* of the County which may be so deposited with it." There was no preliminary recital that the cur-

rent funds were to be deposited as in the case at bar.

The approval and filing of the bond was an afterthought craftily conceived.

The bond was not accepted because it was different from every other bond held by the County. The Maryland bond alone carried the pro rate clause. They had rejected all bonds containing that clause. The Maryland would write no bond without it. They wanted uniformity and the prosecuting attorney demanded it (Tr. p. 56). The Maryland never agreed to write a bond without the pro rate clause, and the County never agreed to take a bond with it.

When the bank was running and they held plenty other security, and they suspected no danger, they refused our bond; it was not good enough for them; but when the deluge came on that fatal 19th day, with a tergiversation worthy of a Machiavel, they rushed off to the clerk and made an *ex-parte* filing of the bond.

We respectfully submit the cause should be reversed and dismissed.

JOHN W. ROBERTS,
Attorney for Plaintiff in Error,
ROBERTS, WILSON & SKEEL,
Of Counsel.

No. 2947

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARYLAND CASUALTY COMPANY, A Corporation of the State of Maryland,

Plaintiff in Error,

vs.

PACIFIC COUNTY, a Municipal Corporation, and
One of the Counties of the State of Washington, and

J. L. GLAZEBROOK, as County Treasurer of said Pacific County,

Defendants in Error.

Brief of Defendants in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

CHARLES O. BATES,
CHARLES T. PETERSON,

National Realty Bldg., Tacoma, Washington,

JOHN I. O'PHELAN,

Raymond, Washington,

Attorneys for Defendants in Error.

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No. 2947

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARYLAND CASUALTY COMPANY, A Corporation of the State of Maryland,
Plaintiff in Error,

vs.

PACIFIC COUNTY, a Municipal Corporation, and
One of the Counties of the State of Washington, and
J. L. GLAZEBROOK, as County Treasurer of said
Pacific County,
Defendants in Error.

Brief of Defendants in Error

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON,
SOUTHERN
DIVISION.

CHARLES O. BATES,
CHARLES T. PETERSON,
National Realty Bldg., Tacoma, Washington.
JOHN I. O'PHELAN,
Raymond, Washington,
Attorneys for Defendants in Error.

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STATEMENT.

Plaintiff in Error has made a partial statement of the facts, which because of its brevity may be misleading. We will therefore endeavor to make a full correct statement of the facts involved.

Defendants in Error brought action against

plaintiff in error in the Superior Court of Pacific County, Washington, for the recovery of Ten Thousand Dollars, the full penalty of a depository bond executed by plaintiff in error in behalf of the First International Bank of South Bend, Washington, to defendants in error, to secure deposits of County moneys deposited by defendants in error in said First International Bank of South Bend.

In due time the cause was on petition of plaintiff in error removed to the Federal Court for the Western District of Washington, Southern Division, where upon the issue being joined a trial was had resulting in judgment in behalf of defendants in error in the sum of \$9281.32.

The Court did not make formal findings, but entered a decree adjudging certain facts in the nature of findings, covering the controlling features of the case, (Trans. p. 35), portions of which will be hereafter referred to in connection with the facts as stated by us.

On July 12th, 1915, the First International Bank of South Bend, Washington, delivered to J. L. Glazebrook, as Treasurer of Pacific County, Washington, a certain bond duly executed, as follows:

“KNOW ALL MEN BY THESE PRESENTS,
That First International Bank of South Bend,
Washington, as Principal, and Maryland Cas-

ualty Company, a corporation of the State of Maryland, as surety, are firmly held and bound under J. L. Glazebrook, Treasurer of the County of Pacific, State of Washington, in the sum of Ten Thousand Dollars (\$10,000), for the payment of which, well and truly to be made, we hereby bind ourselves, our and each of our successors and assigns, jointly and severally, firmly by these presents.

“Dated this 9th day of July, A. D. 1915.

“Whereas, the said Principal, First International Bank, has been designated by J. L. Glazebrook, Treasurer of Pacific County, as a depository of the current funds in the hands or possession of the said Treasurer, J. L. Glazebrook, to be deposited in the said Bank; the amount whereof shall be subject to withdrawal or diminution by said Treasurer, as the requirements of said County shall demand, and which amount may be increased or decreased as the said Treasurer may determine, and,

Whereas, the said Bank in consideration of such deposit and of the privilege of keeping same has agreed to pay the County of Pacific, State of Washington, interest on said sum upon the average daily balance the said Bank shall have on deposit for the month, or any fraction thereof next preceding the crediting of said interest, which interest shall be computed and credited to the account of J. L. Glazebrook, Treasurer of said County of Pacific, State of Washington, and shall become thenceforth a part of such deposit.

NOW, THEREFORE, if the said First International Bank shall at the beginning of every month render to the Treasurer of the County of

Pacific, State of Washington, a statement showing the daily balance of such County moneys held by it during the month next preceding and interest thereon, and how the same has been credited, and shall well and truly keep all such sums of money so deposited, or to be deposited, as aforesaid, and the interest thereon, subject at all times to the check and order of J. L. Glazebrook, Treasurer as aforesaid, and shall pay over the same, or any part thereof, upon the check or written demand of said Treasurer, or to his successor in office, and shall calculate, credit and pay such interest, as aforesaid, and shall in all respect save and keep the said County, and the County Treasurer of the said County, harmless and indemnified for and by reason of the making of said deposit or deposits, and shall in all respects comply with House Bill No. 90, entitled, 'An Act regulating the keeping and deposit of public funds in Banks by the several Treasurers of the State of Washington', passed by the Legislature of the State of Washington, at its Tenth regular session, in the year 1907, then this obligation shall be void and of no effect, otherwise to be and remain in full force and effect.

PROVIDED:

1. That the Maryland Casualty Company, Surety on said bond shall have the right to terminate its liability under this obligation by serving notice of its election so to do upon the said Treasurer, and the said Surety shall be discharged from any and all liability hereunder for any default of the said First International Bank, Principal, occurring after the expiration of thir-

ty (30) days after the service of such notice.

2. The Surety shall only be liable for such proportion of the total loss or damage sustained by said Obligee, by reason of any default of the Principal embraced within the terms of this bond, as the penalty of this bond shall bear to the total sum of all bonds and securities which may be given to secure the deposits above referred to; and in no event shall the Surety hereunder be liable for any sum in excess of the penalty of this bond.

IN WITNESS WHEREOF, we have hereunto affixed our corporate seals and caused this bond to be duly signed by our respective authorized officers, Agents, or Attorneys in Fact, the date and year first hereinbefore written."

(Trans. pp. 24-25-26)

Eliminating the Ten Thousand Dollar bond sued on in this action, it was admitted that at the time the bond sued on herein was placed in the hands of Glazebrook, as County Treasurer, that he had other securities consisting of surety bonds amounting to Thirty-six Thousand Dollars, and municipal bonds and mortgages amounting to Ten Thousand Five Hundred and Twenty-five and 65-100 Dollars, making a total of Forty-six Thousand Five Hundred and Twenty-five and 65-100 Dollars, as security for moneys deposited by him in the First International Bank of South Bend.

(Admission, Trans, pp. 60-61)

That on said date the County Treasurer had on deposit in said First International Bank of South Bend, Washington, the sum of \$50,349.00.

Glazebrook, as Treasurer, deposited Four Thousand Dollars on July 13th, 1915, and Four Thousand Dollars on July 14th, and on July 14th, 1915, checked out Four Thousand Dollars, (Plaintiff's Brief, p. 38), so that at the close of business on July 17th, 1915, he had on deposit, including interest computed, \$52,457.97.

(Glazebrook, Trans. p. 65).

(Finding of Court, Tr. p. 66).

Where the Court said:

"I find the liability to be \$52,457.97, amount on deposit 17th of July. I eliminate the Illinois Surety Company. I hold that the face of all bonds, municipal, local improvement, warrants and district bonds are to be included at their face with the various surety company bonds, exclusive of Illinois Surety in determining the pro rata liability. Liability on this bond is a matter of interpretation of a contract."

There was some controversy as to just when the bank closed its doors. The testimony of Langley, Bank Examiner, is probably correct. The ledger sheet of the bank, (Exhibit No. 8), showing entries on July 17th, 1915, (Trans. p. 53), and the record of the bank showing that deposits were received on the

17th day of July, (Langley, Trans. p. 54), indicate that it did business throughout Saturday, July 17th, and that its failure actually took place, so far as doing business was concerned, when it failed to open its doors on Monday morning, July 19th.

In this connection the trial court adjudged:

“That said First International Bank of South Bend failed to open its doors on Monday, July 19th, 1915.”

(Trans. p. 38)

On July 14th, 1915, Glazebrook addressed a letter (Exhibit “A”), to plaintiff in error, at its office in Seattle, Washington, as follows:

“Maryland Casualty Company,
Seattle, Washington.
Gentlemen:

In re Bond of First International Bank.

We have your depository bond for \$10,000 dated July 9th, 1915, in favor of J. L. Glazebrook, County Treasurer.

The Prosecuting Attorney refuses to approve any bond carrying the **pro rata** clause, and we ask you to kindly give us a bond in which this item is eliminated, or followed by the following:

‘Provided, however, that if such other bonds or securities are insufficient for any reason to fully make, together with the aforesaid proposition under this bond, the full amount of interest and principal demanded and refused and interest thereafter accruing to time of actual pay-

ment to said Treasurer, then and in that event the surety hereunder shall be liable to said Treasurer to the full amount of loss sustained by reason of such insufficiency.'

If you will deliver to your agent here a bond as stated above we will deliver the bond we now have to him and take the new bond in lieu thereof.

If you prefer we promise to return to you immediately the old bond above-mentioned as of July 9th, upon receipt of new bond corrected to read as stated above.

Thanking you for your kindness in the above matter, we are,

Very truly yours,
J. L. GLAZEBROOK,
County Treasurer."

(Trans. pp. 38-39)

(Glazebrook, Trans. p. 48)

It did not require a day for the mail to reach Seattle from South Bend.

(Opinion, Trans. p. 48)

It was testified by the bonding company's witnesses that this letter reached the office of John A. Whalley & Company, Agents, to whom application for the bond was made, and who delivered it to the bank personally, on Saturday afternoon, July 17th.

(Cran-Whalley, Trans. p. 59)

In this connection the trial court found by way of adjudication,

“That it required one day for this letter to reach Seattle, Washington, from South Bend, Washington, but that it was not answered by defendant until after the 19th of July, 1915.”

(Trans. p. 39)

This letter was not answered by the bonding company until after July 19th, 1915, when the bank failed to open its doors. The bond was approved by O’Phelan, Prosecuting Attorney of Pacific County, and Glazebrook, as Treasurer, on July 12th, 1915.

(Glazebrook, Trans. p. 47)

This was expressed by the trial court as a fact, (see Opinion, Trans. p. 32), as follows:

“In view of the treasurer’s testimony that he and the county attorney approved the bond on July 12th, it is not necessary to consider what, if any, effect the want of such approval would have. It is true that the treasurer, in his letter of July 14th to the defendant, says:

‘The Prosecuting Atty. refuses to approve any bond carrying the **pro rata** clause.’

If this be construed as meaning that the county attorney had not approved the bond, in view of the treasurer’s sworn testimony that the bond had already been approved by both the county attorney and himself on the 12th of July, coupled with the fact that, on the 13th and 14th—immediately after the receipt of the bond, the treasurer made \$8000 deposits, which he could not legally make without the bond, yet such unsworn misstatement does not justify the rejec-

tion of the sworn testimony, supported by such conduct."

(Trans. p. 32)

A certain bond of the Illinois Surety Company expired on July 1st, 1915, and the Treasurer's purpose in getting the bond sued on herein was to cover deposits therefore covered by the Illinois Surety Company bond.

(Glazebrook, Trans. p. 51)

The fact that the bond was not filed with the County Clerk, as required by the statute, is fully explained by the Treasurer in his testimony, as follows:

"I did not file the bond with the clerk because the company had not sent me bond carrying the clause outlined. If I had filed it, and the company sent me the bond carrying the clause outlined, it took an order of the court to take this one, (indicating the bond sued on). It required a cancellation notice of ninety days, and in that event I would have held two bonds against this company for ten thousand dollars each."

(Glazebrook, Trans. p. 50)

In accordance with the Treasurer's testimony the Court found by way of adjudication, as follows:

"It is further adjudged and decreed that said bond was accepted by the county treasurer of Pacific County, Washington, for present purposes, and until such time as defendant would

furnish it a new bond containing the provisions suggested in the county treasurer's letter of July 14th, 1915."

(Trans. p. 39)

On the second Monday of January, 1915, Glazebrook filed with the Board of County Commissioners of Pacific County, Washington, a written designation of the First International Bank of South Bend, as a county depository.

(Admission, Trans. p. 54)

Mr. O'Phelan, Prosecuting Attorney, demanded the clause in the bond for the sake of uniformity, and notwithstanding that fact, and without such uniformity being in the bond sued on herein he approved it.

(O'Phelan, Trans. p. 56.)

ARGUMENT.

The following statutes of the State of Washington are important to a consideration of the questions involved.

"Section 777. BONDS ARE NOT TO FAIL FOR WANT OF FORM. No bond required by law, and intended as such bond, shall be void for want of form or substance, recital or condition;

nor shall the principal or surety on such account be discharged, but all the parties thereto shall be held and bound to the full extent contemplated by the law requiring the same, to the amount specified in such bond. In all actions on such defective bond, the plaintiff may state its legal effect in the same manner as though it were a perfect bond."

The Supreme Court of the State of Washington in *Ihrig v. Scott*, (1893), 5 Wash. 584, held the provisions of this section applicable to bonds such as the one involved in the instant case.

Section 958 provides:

"Section 958. OFFICIAL BONDS, TO WHOM DEEMED SECURITY. The official bond of a public officer to the state, or to any county, city, town, or other municipal or public corporation of like character therein, shall be deemed a security to the state, or to such county, city, town, or other municipal or public corporation, as the case may be, and also to all persons severally, for the official delinquencies against which it is intended to provide."

Referring to county depositories the statute provides:

"Section 5073. Before any such designation or designations shall become effectual and entitle the said treasurer to make deposits in such bank or banks, the bank or banks so designated shall within ten days after such designation or designations have been filed, file with the county clerk of such county a surety bond to such county

treasurer properly executed by some reliable surety company qualified under the laws of this State to do business therein, in the maximum amount of deposits designated by said treasurer to be carried in such bank or banks, conditioned for the prompt and faithful payment thereof on checks drawn by such treasurer, which bond must be approved by the chairman of the board of county commissioners, the prosecuting attorney and the county treasurer, or any two of such officers of said county, before being filed with the county clerk, and unless so approved the same shall not be received or filed by the county clerk; Provided that said depositary or depositaries may deposit with the county treasurer good and sufficient municipal, school district, county or State bonds or warrants, United States bond, first mortgage railroad bonds listed on the New York stock exchange, or local improvement bonds or warrants whose legality have been passed upon favorably by the supreme court or public utility bonds or warrants issued by or under the authority of any municipality of the State for water, power or light plants or maintenance thereof upon which principal or interest is not in default at the time of such deposit, the aggregate market value of which shall not be less than the amount required in said deposit, in lieu of the surety bond herein provided for."

"Sec. 5075. The county treasurer shall deposit with any depositary or depositaries which have fully complied with all requirements as herein provided, any county moneys in his hands or under his official control, and for the purpose

of making the quarterly settlement and counting funds in the hands of the treasurer any such sums so on deposit shall be deemed to be in the county treasury."

(Trans. pp. 28-29)

And Section 8327, of the statute relative to official bonds, providing as follows:

"Sec. 8327. Whenever any such official bond shall not contain the substantial matter or condition or conditions required by law, or there shall be any defect in the approval or filing thereof, such bond shall not be void so as to discharge such officer and his sureties, but they shall be bound to the State or party interested, and the State or such party may, by action instituted in any court of competent jurisdiction, suggest the defect of such bond or such approval or filing, and recover his proper and equitable demand or damages from such officer and the person or persons who intended to become and were included in such bond as sureties." (Rem. & Bal. Code).

(Trans. pp. 29-30)

The trial Court took the view that the section of the statute last above quoted is applicable to a depository bond, such as the one in suit.

In this connection Judge Cushman in his opinion, referring to this section, citing cases, said: (Op. Trans. p. 30).

“The last section quoted is applicable to a bond of a depository, such as the one in suit.

Board of Commissioners v. Duluth, 77 N. W. 815.

State v. Pederson, 114 N. W. 828.

Henry County v. Salmon, 100 S. W. 20, at 24.

The provisions of Section 5073 are solely for the protection of the public and its money and, in so far as the filing of the bond is concerned, it is not material for the protection, benefit or advantage of a surety or guarantor such as defendant.

Peoples v. Edwards, 9 Cal. 286.

Deer Lodge County v. U. S. F. & G. Co., 112 Pac. 1060.

Buhrer v. Baldwin, 100 N. W. 469.

Henry County v. Salmon, 100 S. W. 20, at 24.

This being the holding of the Court, it is not necessary to consider the effect of the bond as a common law obligation.”

In the case of Board of Commissioners v. Bank of Duluth, *Supra*, involving a depository bond, the Supreme Court of Minnesota observed thus: (Op. p. 817):

“Counsel for the defendants urge that this is not a case of suretyship for a public officer, and that the obligation of the defendants does not in any manner relate to the performance of official duties due to the public, and hence that the case must be governed by the rules applicable to private bonds to secure the performance of duties

due to private persons. In this counsel is in error. While the bank may not have been a "public officer", in the popular sense of that term, yet in the matter of the county money deposited with it it was performing public duties, or duties to the public, and pro hac vice was a public officer. Its duty was to the public, and its bond to secure the performance of that duty was for the benefit and protection of the public. The case falls within all the reasons of the rule, founded on public policy, which makes certain distinctions between the rights and liabilities of sureties on private bonds and sureties on bonds given to secure the performance by public officers of their official duties to the public. The case must be determined by the rules applicable to the latter."

In a like case the Supreme Court of Wisconsin in *State v. Pederson*, *Supra*, said, (Op. p. 829):

"The bond in suit here was an official bond because prescribed by public law. *Murfee on Official Bonds*, Sec. 36; *Faurote v. State*, 110 Ind. 463, 11 N. E. 472; *Hart v. U. S.*, 95 U. S. 316, 24 L. Ed. 479. The bank was an authorized state depository charged with the public duty of safely keeping and paying over such state moneys as should be deposited with it, and thus became a public officer."

See also *County Commissioners v. State Bank*, (Minn.), 66 N. W. 143. The Supreme Court of Oklahoma in *Western Casualty etc. Co. v. Board of Com-*

missioners, 159 Pacific (Op.) 658, quoted from that case as follows:

“In *County Commissioners v. State Bank*, supra, the board of county commissioners had designated the depository in the teeth of a statute requiring the board of auditors to make the designation. In a suit on the bond the sureties defended on the theory the designation was void. What was said in disposing of that contention is applicable in this case, viz.: ‘In principle, this case falls within the rule that the sureties upon an official bond, by virtue of which the officer has been inducted into office, cannot, when called upon to answer for his official defaults, escape liability upon the ground that their principal was not duly elected or appointed, or did not legally qualify. *Mechem*, Pub. Off., Sec. 341; 2 *Brandt*, Sur. Sec. 521; *State v. Bates*, 36 Vt. 387; *People v. Evans*, 29 Cal. 429; *Byrne v. State*, 50 Miss. 688; *Taylor v. State*, 51 Miss. 79.”

See also *Henry County v. Salmon*, (Mo.) 100 S. W. 20.

Plaintiff in Error contends that no showing was made of a designation of the First International Bank of South Bend as depository; no contract was shown requiring the bank to pay interest on average daily balances, and particularly complains that no designation fixing the maximum amount of deposits was shown, and no showing made on the part of the

Treasurer that he had any right to deposit any money in the bank.

(Brief, pp. 8-9)

It is true that a written designation fixing the maximum amount of deposits was not introduced in evidence, and there is nothing in the record in that regard. There being no evidence in this connection the law presumes that the County Treasurer of Pacific County, Washington, performed his duty, and in the light of that presumption the trial court assumed, and this Court will assume, that the County Treasurer did not at any time deposit moneys in the First International Bank of South Bend, Washington, in excess of the maximum amount fixed in the designation.

The bond itself recites,

“Whereas the said principal, First International Bank has been designated * * * as a depository * * * etc.”

This recital contained in the bond, which plaintiff in error itself executed, estops it to deny that the bank was so lawfully designated.

Henry County v. Salmon, (Mo.) 100 S. W. 20.

In the course of its opinion the Court observed thus, (Op. p. 23):

“When faith and credit have been given to a depositary bond and such bond has performed the function of obtaining for its principals money, property or other valuable thing, it illy becomes its obligors to invoke immaterial variances from statutory form in avoidance of liability. Bonds of like character have been held binding, though not in precise statutory form. *State ex rel. v. O’Gorman*, 75 Mo. 370; *Newton v. Cox*, 76 Mo. 352; *Wimpey v. Evans*, 84 Mo. 144.

And, finally (if the foregoing were not conclusive), it must not be lost sight of that the bond in suit narrates that Salmon & Salmon were selected as county depositary. The proof is that, on the making of the bond and its filing and approval, Salmon & Salmon became the county depositary. They assumed and acted that role, received all the county moneys as such depositary, and thereby to all intents and purposes became county depositary *de facto*. By signing and delivering the bond in suit the sureties intended Salmon & Salmon should be county depositary. That act enabled them to get hold of the county moneys. Under such conditions it becomes immaterial whether there was any formal order designating Salmon & Salmon county depositary. Such order was not intended for the benefit of the sureties, it was no concern of theirs. Its office was to give authority to the depositary to demand the county funds from the treasurer, and its force is spent in that direction. Section 6821, *supra*. The engagement of these sureties was to stand sponsor for Salmon & Salmon—to answer for their default. Now, that default could arise as well on an irregular as regular, designation of them as depos-

itary—whether they were a depositary de facto or de jure. Moreover, the bond was for the benefit of the public, not the sureties.”

In *Commissioner of Hennepin County v. State Bank*, (Minn.), 66 N. W. 143, the Court said:

“In the case of *Board v. Gray* (Minn.) 63 N. W. 635, we held, in an action upon a bond similar to the one here in question, that the provisions of the statute relating to the designation of county depositaries were for the benefit of the public, and not for the sureties, and that, where the depositary was actually designated by the board of auditors, a failure to comply with the requirements of the statute in making such designation would not affect the liability of the sureties; or, in other words, if the principal in the bond was a de facto depositary of the county funds, recognized as such by the treasurer and other county officers, and the county funds were actually deposited with the principal, as such depositary, in reliance upon the bond, the sureties were liable, in case of default in the conditions in the bond, although, in law, the principal was never designated as a depositary. Public interests would be seriously jeopardized if the sureties upon a county depositary bond could exonerate themselves from liability by showing that he was not such de jure. It is true, the condition of the bond is that, if the principal shall be designated a depositary pursuant to the statute, the sureties shall be liable for its default: but the regularity or legality of the designation is not of the substance of the condition, for its substance is that if the funds of the county are de-

posited with the principal, as a depositary, it shall pay over the money on demand. Depositories of county funds, under the statute, are quasi public officers. They are financial agents of the county, and hold its funds in place of the treasurer. The allegations of the complaint show that the bank was a *de facto* depositary, and was recognized as a lawful depositary by the board of county commissioners and the county treasurer, and the public funds deposited with it in reliance upon its official bond; but it was not a *de jure* depositary, because it was designated by the board of county commissioners, and not by the board of auditors. In principle, this case falls within the rule that the sureties upon an official bond, by virtue of which the officer has been inducted into office, cannot, when called upon to answer for his official defaults, escape liability upon the ground that their principal was not duly elected or appointed, or did not legally qualify. *Mechen*, Pub. Off. Sec. 341; *2 Brandt*, Sur. Sec. 521; *State v. Bates*, 36 Vt. 387; *People v. Evans*, 29 Cal. 430; *Byrne v. State*, 50 Miss. 688; *Taylor v. State*, 51 Miss. 79. In the last case cited the officer's appointment was void, and it was held that the sureties, when sued on his official bond, could not set up the illegality of the appointment as a defense. So, in the case at bar, the designation of the principal in the bond as a county depositary was absolutely void, because made by the board of county commissioners, and not by the board of county auditors; still it was in fact a depositary, and was inducted into office, and the county funds deposited with it, in reliance upon the bond, and the fact that it was not designated such depositary by

the proper board does not exonerate the sureties on the bond. Order reversed."

In *Talley v. State*, 180 S. W. 330, (Ark.), the Court observed thus:

"There was an order approving the bond which recites the fact that the bank had been duly designated by the county court as such county depository, and the funds of the county were paid over to the bank. The bank and its sureties are estopped to deny that there had never been a designation of the bank as such depository. *Hennepin County v. State Bank*, 64 Minn. 180, 66 N. W. 143."

To the same effect is *Buhrer v. Baldwin*, 100 N. W. 468.

Commissioners v. American Loan & Trust Co.,
78 N. W. 113.

Plaintiff in Error complains bitterly, (Brief pp. 8-9), because action was not taken on the official bond given by the Treasurer as such to Pacific County, instead of on its depository bond, which, as we have shown, is governed by the same rules as apply to official bonds. The fact, if it be a fact, that the people of Pacific County have double security for their money is a circumstance of no legal importance. If they are so secured the officials of that County are the ones who have the right to determine to which

security they will first resort. So far as the record in this case is concerned it does not enable anyone to say with certainty that the Treasurer's official bond to the County is sufficient, so therefore it cannot be said that the County will not lose its money if it is defeated in the present action.

Counsel takes the position, (Brief, p. 9), that the bond in question did not become effective until filed in the office of the Clerk of the Superior Court, quoting from Section 5073 of the Code.

As our argument in this connection we offer the following from Judge Cushman's opinion:

"The provisions of section 5073 are solely for the protection of the public and its money and, in so far as the filing of the bond is concerned, it is not a matter for the protection, benefit or advantage of a surety or guarantor such as defendant.

Peoples v. Edwards, 9 Cal. 286.

Deer Lodge County v. U. S. F. & G. Co., 112 Pac. 1060.

Buhrer v. Baldwin, 100 N. W. 469.

Henry County v. Salmon, 100 S. W. 20, at 24.

This being the holding of the Court, it is not necessary to consider the effect of the bond as a common law obligation."

(Trans. p. 30)

In People v. Edwards, Supra, Justice Field said:

“The defect in the approval of the bond, if any existed, could not avail the defendants. The object of requiring the approval is to insure greater security to the public, and it does not lie in the defendants to object that their bond was accepted without proper examinations into its sufficiency by the officers of the law.”

In 1850 the State of California adopted a statute referring to bonds containing the exact essentials of Sections 777 and 8327 of the statutes of the State of Washington, R. & B. Code above referred to. This statute was carried forward with slight changes not effecting its substance, and is now Section 963, Pol. Code Cal. 1897. It was considered by Justice Field in *People v. Edwards*, 9 Cal. 286, and later in *People v. Evans*, 29 Cal. 430, where it was held that the sureties on a bond were not released even though the bond was approved by the wrong officer, which in effect amounted to no approval at all.

This was followed in *Mendocino County v. Morris*, 32 Cal. 145, and in *People v. Huson*, 78 Cal. 154, where the Court said:

“The settled rule is that the failure of the proper officers to approve an official bond will not invalidate it nor release the sureties from their liability upon it.”

All of these California cases were decided prior to the adoption of our Code, (Laws of 1890, p. 35).

(Code of 1881, Sec. 749).

Having borrowed these sections from the California Code it will be assumed that in so adopting them our legislature intended that the construction theretofore given by the highest court of California should be the rule for the construction of those statutes.

It is next contended, (Brief, p. 13), that there was no acceptance of the bond. Under this heading counsel cite a number of authorities which under their facts are so far removed from the case at bar that a discussion of them would serve no useful purpose. This question of fact **was** resolved by the the trial court against plaintiff in error in its finding by way of adjudication, as follows:

“It is further adjudged and decreed that said bond was accepted by the county treasurer of Pacific County, Washington, for present purposes, and until such time as defendant would furnish it a new bond containing the provisions suggested in the county treasurer’s letter of July 14th, 1915.

“That it required one day for this letter to reach Seattle, Washington, from South Bend, Washington, but that it was not answered by defendant until after the 19th of July, 1915.”

(Trans. p. 39.)

In this connection Judge Cushman in his Memorandum Decision said:

“In view of the treasurer’s testimony that he and the county attorney approved the bond on July 12th, it is not necessary to consider what, if any, effect the want of such approval would have. It is true that the treasurer, in his letter of July 14th to the defendant, says:

“ ‘The Prosecuting Atty. refuses to approve any bond carrying the **pro rata** clause.’

“If this be construed as meaning that the county attorney had not approved the bond, in view of the treasurer’s sworn testimony that the bond had already been approved by both the county attorney and himself on the 12th of July, coupled with the fact that, on the 13th and 14th—immediately after the receipt of the bond, the treasurer made \$8000 deposits, which he could not legally make without the bond, yet such unsworn misstatement does not justify the rejection of the sworn testimony, supported by such conduct.

“The fact that the treasurer disobeyed the direction of the statute and deposited this money before the filing of the bond with the county clerk in no way takes from the presumption that he, as a public officer, did his duty in other respects.

“The defendant’s contention that, before it became bound, notice to it of the acceptance of the bond by the county was necessary and that no such notice was given yet remains for consideration. It is not necessary to determine

the first question, unless, in fact, no such notice was given.

“Passing the question of whether or not the defendant is not inconsistent in contending that the treasurer—who, it maintains, had no authority to accept the bond—could reject it, there is no statute requiring notice to the guarantor. The treasurer’s letter is not a present rejection of the bond.

“Although the bond does not purport to run for any particular term, the defendant could not terminate its liability, save upon 30 days notice of its election so to do.

“If entirely satisfactory, it was, no doubt, contemplated that the bond should run for months. The provisions for the monthly report by the bank depository to the treasurer, alone show this. But there is nothing in the statute, nor the bond, that obligated the county or the treasurer to accept the bond for a definite term or, once accepted, to retain such bond and not require any other in lieu of it for any definite time. It might hold the bond for a day or a year, or until the next January when it would become the duty of the treasurer to designate a depository.

“The pains taken by the treasurer in his letter to point out that, upon receipt of a bond worded to the satisfaction of the county attorney, the bond received and held, would be returned in one of two ways, as the defendant might choose, show that the bond delivered had been accepted for the present, but, as the county and treasurer were not bound to accept it for a defi-

nite time, it was accepted until the imposed conditions were complied with; that, for present purposes, pending negotiations, it would be accepted, but that, unless the imposed conditions were met, it would be rejected.

“The letter clearly shows an intention only to reject the bond, by either returning it to the defendant’s agent at South Bend, or direct to the defendant in Seattle. This, of itself, is a notice of present acceptance pending negotiations for a more satisfactory bond.”

(Trans. pp. 32-33-34.)

The authorities cited by counsel in this connection to the effect that the bond in the instant case did not become a binding contract until formal notice of acceptance thereof was given, has no application here, first, because it was accepted as found by the trial court, and secondly, even if it were not accepted no formal notice of acceptance was necessary.

The case of *Buhrer v. Baldwin*, 100 N. W. 469, presents a parallel state of facts. In the course of its opinion the Court said, (Op. p. 470):

“It is insisted that defendants are not bound by their guaranty, because they have never been notified of its acceptance. We think the true theory upon which guarantors are entitled to notice of acceptance is that their undertaking is a mere offer, and does not become a binding contract until such notice. See *Davis v. Wells*, 104

U. S. 159, 26 L. Ed. 686. It results from this theory that guarantors are entitled to notice of acceptance only when their undertaking can be construed to be an offer of guaranty. When, however, that undertaking recites a consideration, though, as in this case, that consideration is merely nominal, conclusive evidence is furnished that the guaranty has been made with the assent of the obligee, communicated to the guarantors; and in such cases notice of acceptance is unnecessary."

The bond in the instant case recites:

"Whereas the said Bank in consideration of such deposits and of the privilege of keeping same."

The bond being one entire and original contract and not collateral on the part of the sureties, the consideration received by the bank was sufficient to support the contract on the part of the bonding company.

U. S. v. Linn, 15 Peters, 290. 10 L. Ed. 742.

Indeed, the testimony shows that the bonding company was receiving a premium as consideration for the execution of this bond, which, of course, was known to the bank and the treasurer as well, and when this completed contract was turned over by the bank to the County Treasurer it became effective.

Counsel next contends that there was not sufficient proof of approval of the bond prior to the failure of the bank. This fact was likewise resolved against plaintiff in error by the trial Court.

In the course of his Memorandum Decision Judge Cushman said:

“Under the statutes and authorities cited above, it was not necessary, in order for the bond to become effective, that it be filed with the county clerk. It became an obligation binding upon the defendant when the bank delivered it to the treasurer and received, on July 13th and 14th, deposits from him under its protection.

In view of the treasurer’s testimony that he and the county attorney approved the bond on July 12th, it is not necessary to consider what, if any, effect the want of such approval would have. It is true that the treasurer, in his letter of July 14th to the defendant, says:

‘The Prosecuting Atty. refuses to approve any bond carrying the **pro rata** clause.’

If this be construed as meaning that the county attorney had not approved the bond, in view of the treasurer’s sworn testimony that the bond had already been approved by both the county attorney and himself on the 12th of July, coupled with the fact that, on the 13th and 14th, immediately after the receipt of the bond, the treasurer made \$8000 deposits which he could not legally make without the bond, yet such unsworn misstatement does not justify the rejection of the sworn testimony, supported by such conduct.

The fact that the treasurer disobeyed the direction of the statute and deposited this money before the filing of the bond with the county clerk in no way takes from the presumption that he, as a public officer, did his duty in other respects."

(Trans. pp. 31-32)

In this connection it will be remembered that the Treasurer made deposits of Eight Thousand Dollars, which he could not have legally made without the protection of this bond, because as the record shows, the bond of the Illinois Surety Company expired on July 1st, 1915.

(Glazebrook, Trans. p. 51)

This fact having been found against plaintiff in error by the trial court on evidence amply establishing it, no good purpose would be served by a further discussion of it.

Under the title, "Bond not Retrospective," (Brief, p. 24), counsel for plaintiff in error discuss the question of construction of the bond involved.

In this connection we can do no better than to again quote from the Memorandum Decision of Judge Cushman, wherein he said:

"The condition of the bond that,

'If the principal * * * shall well and truly keep all such sums of money so deposited, or to be de-

posited, as aforesaid, * * * then this obligation to be void and of no effect.'

must be construed to contemplate all present and future deposits. Any other construction is, necessarily, forced and strained.

Kephart v. Buddecke, 80 Pac. 501.

Myers v. Board of Commissioners, 56 Pac. 11.

Brown v. Board of Commissioners, 50 Pac. 888.

It is true that in Brown v. Board of Commissioners, (80 Pacific, 501, supra) certain recitals of the bond were different from those of the bond in the present case and that the Court in its ruling, to a certain extent, relied upon these different provisions.

It is a well-known rule of construction, both of statutes and written instruments that all the words used must be given a meaning, unless inconsistencies would result therefrom.

If only future deposits were in view the words would have been 'so to be deposited as aforesaid.' If the meaning of the instrument is as contended for by the defendant, the words 'so deposited' serve no purpose. The reference to the prior recital, indicated by the use of the words 'so' and 'aforesaid' could only relate to the terms of the deposit 'subject to withdrawal or diminution by said treasurer as the requirements of said county shall demand.' "

(Trans. pp. 30-31)

Plaintiff in Error being a compensated surety

cannot invoke the rule of strict construction. Its contract must be construed as other contracts to effectuate the intention of the parties, and the purposes they sought to accomplish.

Puget Sound State Bank v. Gallucci, 82 Wash. 452.

Costello v. Bridges, 81 Wash. 202.

The purpose of making the contract was to protect Pacific County against the loss of its money. It was known to the bonding company that the First International Bank of South Bend had been designated in the month of January, 1915, as a depository of the public moneys of Pacific County. That fact is recited in the bond itself, and the bond in question given under date of July 9th, 1915, referring to said moneys provides:

“Now, therefore, if the said First International Bank shall * * * * well and truly keep all such sums of money so deposited, or to be deposited, as aforesaid, and the interest thereon, subject at all times to the check and order of J. L. Glazebrook, Treasurer, as aforesaid, and shall pay over the same, or any part thereof, upon the check or written demand of said Treasurer, or his successor * * * *, and shall save and keep the said County and the County Treasurer * * * harmless, and indemnified for and by reason of the making of said deposit, or deposits, * * * * then this obligation shall be void, etc.”

The case of Kephart v. Buddecke, (Col.), 80 Pac. 501, involved deposits made under a bond containing in effect the identical language involved here. We quote therefrom, (Op. p. 502).

“Now, therefore, if the said Bank of Montrose shall well and truly keep all said sums of money so deposited, or to be deposited, as aforesaid, subject to the check and order of the said George W. Kephart, treasurer as aforesaid, and shall pay over the same and each and every part thereof, to the said Treasurer upon his written demand therefor, and shall estimate, calculate and pay said per centum as aforesaid, and shall, in the event said money or any part thereof remain in its custody after the expiration of the term of office of said George W. Kephart, pay over such sum or sums to his successor in office, as shall by him demanded and shall in all respects save and keep him, the said George W. Kephart, and his sureties to the state of Colorado, harmless and indemnified for and by reason of the making of said deposit or deposits, then this obligation to be void, and of no effect, otherwise to be and remain in full force and virtue.”

In the course of its opinion the Court observed thus, (Op. p. 503):

“Effect must, if possible, be given to every clause and every word; and no word is to be regarded as superfluous if a meaning which is reasonable and in harmony with the other parts of the contract can be assigned to it. 17 Am. &

Eng. Enc. of Law (2nd Ed.) 7; Lawson on Contracts, Sec. 389; *People v. May*, 9 Colo. 80, 10 Pac. 641; *Vary v. Shea*, 36 Mich. 388; *Heywood v. Heywood*, 42 Me. 229, 66 Am. Dec. 277; *Philadelphia v. River Front R. Co.*, 133 Pa. 134, 19 Atl. 356. The word 'so' and the words 'as aforesaid,' with which it is associated, were intended to render the meaning of the words 'deposited' and 'to be deposited' definite. The entire phrase, filled out and completed would read, 'All said sums of money so deposited as aforesaid, or all said sums of money so to be deposited as aforesaid.' In point of time the first clause refers us to the past, the second to the future. The word 'said' preceding the word 'sums,' and the words 'so' and 'as aforesaid,' all point to something previously mentioned in the instrument. We have no authority to pronounce any of them meaningless, if in the preceding language anything can be found which serves to fix its connection or determine the office it was intended to perform. Respecting the words, 'so to be deposited as aforesaid,' there is no difficulty. They are too obviously connected with, and for their meaning dependent upon, the recital, 'Whereas, the said George W. Kephart, treasurer as aforesaid, has determined and will deposit certain of the moneys of the state of Colorado, for safe-keeping, with and in the Bank of Montrose,' to require discussion, or even comment."

In the case of *Brown v. Board of Commissioners of Wyandotte County (Kan.)*, 50 Pac. 888, an action

on a depositary bond, the Court discussing a bond conditioned as follows:

“The conditions of this obligation are such that if the said Argentine Bank shall promptly pay any and all deposits of the county which may be so deposited with it, as such county depository, upon the check or draft of the county treasurer, countersigned by the county clerk of said county, and shall well and truly make report of the amount of money to the credit of the county treasurer at the close of business each day during the previous month, and shall also report and pay the amount of interest accrued during such month, at the rate of one and one-half per cent per annum on all daily balances, then, in that event, this obligation shall be void.”

held the bonding company liable for past as well as future deposits. In the course of its opinion the Court said:

“Plaintiffs in error claim to find such limitation in the words ‘shall pay any and all deposits of the county which may be deposited with it.’ By stress of emphasis upon the auxiliary verbs ‘may’ and ‘be’ counsel endeavor to read them wholly into the future tense, and thereby give the bond a prospective signification. Grammatically the clause ‘which may be deposited’ may have as much the signification of past or present as of future time. The law will principally look at the purpose for which the instrument was required and given, to determine the tense of the verb. That purpose was security for the current

obligations of the bank to the county; that is, for the repayment of such deposits of money as may have been made before demand of payment therefor. The legal authorities in analogous cases support this view."

If there is any material difference in the meaning of the language of the bond in the case at bar, and the obligations involved in the two cases last above cited, the retrospective feature is stronger in the instant case than in those cases. If the doctrine of probabilities, as suggested by plaintiff in error, is involved here, it is altogether probable that the purpose of the bond was as suggested in the Kansas case, security for the obligations of the bank to the county, that is, for the repayment of such deposits of money as may have been made before demanding payment thereof.

THE BOND WAS GOOD AS A COMMON LAW OBLIGATION.

While it is conclusively established by the proof in this case, and was found by the trial court, that the bond was duly accepted and approved on July 12th, and was therefore a statutory bond, still if that had not been done, the bond having been voluntarily

executed by the bonding company and accepted and acted upon by the County Treasurer of Pacific County was good as a common law obligation, and if we grant everything contended for by the plaintiff in error the bonding company is still liable.

The general rule is well stated by Mr. Brandt in his work on "Suretyship and Guaranty." Vol. 1, Sec. 22:

"The general rule is that a bond, whether required by statute or not, is good at common law if entered into voluntarily for a valid consideration, and if it is not repugnant to the law or policy of the law, and the surety on such bond is bound thereby. The voluntary bond of a State Treasurer which is not demandable by law of a county treasurer where there is no law prescribing a bond to be given of a deputy collector of customs, where there is no law prescribing a bond to be given of a plaintiff in an attachment suit when no bond is required by law, are all valid, and bind the sureties who sign them."

Puget Sound State Bank v. Gallucci, 82 Wash. 457.

Buhrer v. Baldwin, 100 N. W. 468.

U. S. v. Linn, 15 Peters, 290, 10 L. Ed. 742.

Federal Case No. 15747, (Op. by Chief Justice Marshall.)

Smith v. Bowman, 9 L. R. A. (N. S.) 889.

Deer Lodge v. Fidelity Co., 112 Pac. 1060.

U. S. F. & G. Co. v. Rainey, 113 S. W. 397.

Hart v. U. S., 95 U. S. 316, 24 L. Ed. 479.

In the latter case the Court said:

“The government is not responsible for the laches or wrongful acts of its officers. (Citing cases.) Every surety upon an official bond to the government is presumed to enter into its contract with the full knowledge of this principle of law, and to consent to be dealt with accordingly.”

This rule is tersely stated in Cyc. thus:

“The bond of a de facto depositary is binding where public funds have been deposited with it in reliance thereon, although the designation of the depositary was not made in accordance with the statute.”

13 Cyc., 816.

The benefits accruing to the Bank by reason of the making of the deposits were sufficient consideration for the bond, and the transaction being one where the bank received a consideration it supported the contract on the part of the surety.

U. S. v. Linn, *supra*.

In U. S. v. Hodson, 10 Wallace 409, (19 L. Ed. 937), it was said:

“But where it (bond) is voluntarily entered into, and the principal enjoys the benefits which it is intended to secure, and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense. In such cases there is neither injustice nor hardship in holding that the contract as made is the measure of the rights of the government and of the liability of the obligors.”

THE AMOUNT OF THE JUDGMENT.

Counsel contends that the judgment of \$9281.32 entered against it by the Court is excessive. The loss suffered by the Treasurer was \$52,457.97, and the total of all bonds and securities was \$56,519.94. (Eliminating the Ten Thousand Dollar bond of the Illinois Surety Company, which expired on July 1st, 1915), and the liability of plaintiff in error was adjudged to be such proportion of Ten Thousand Dollars as \$52,457.97 bears to the sum of \$56,519.94.

The provisions of the other bonds and securities nowhere appear in the record, but it does appear that subsequent to the filing of the bond in the instant case that the Treasurer made Eight Thousand Dollars of deposits. Four Thousand Dollars was

checked out without a special application of the amount, and, of course, would be credited on the oldest obligation.

Commissioners v. Citizens' Bank, 69 N. W. 912.

This would leave Eight Thousand Dollars deposited under the protection of the bond in question.

Now, if we concede, (for the sake of argument, which we do not), the bonding company's contention that it's obligation was prospective only, and covered future deposits, still it would be liable for Eight Thousand Dollars.

On July 9th, 1915, there was on deposit \$50,349.-00 protected by securities of the face value of \$46,519.94. Under the statutes it is made the duty of the County Treasurer before making any deposit to have and file a surety bond, etc., and indulging the presumption that the Treasurer did not violate the statute it follows that the Eight Thousand Dollars deposited by him on July 13th and 14th, after receiving the bond of plaintiff in error, was deposited under the protection of that bond alone, and not otherwise. To hold otherwise would convict the Treasurer of violating the statute.

We respectfully submit the judgment of the
Lower Court should be affirmed.

CHARLES O. BATES,
CHARLES T. PETERSON,
JOHN I. O'PHELAN,
Attorneys for Defendants in Error.

No. 2947

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARYLAND CASUALTY COMPANY, a Corporation of the State of Maryland,
Plaintiff in Error,

vs.

PACIFIC COUNTY, a Municipal Corporation, and
One of the Counties of the State of Washington, and

J. L. GLAZEBROOK, as County Treasurer of said Pacific County,
Defendants in Error.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON,
SOUTHERN
DIVISION

HON. EDWARD E. CUSHMAN, Judge.

Reply Brief of Plaintiff in Error

JOHN W. ROBERTS,
Attorney for Plaintiff in Error,
ROBERTS, WILSON & SKEEL,
Of Counsel.

1304 Alaska Building, Seattle, Wash.

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HON. EDWARD E. CUSHMAN, Judge.

Reply Brief of Plaintiff in Error

Counsel (their brief, p. 9) quote Trial Court to the effect that the letter written by Glazebrook does not overcome his sworn statement. This overlooks the fact that the letter states that both the Treasurer and Prosecutor had refused the bond, and Prosecutor *testified under oath* that he had declined it.

Q. "Well, now, Mr. O'Phelan, you stated now, and I presume that is correct, that you have no recollection as to when you did approve it?"

A. "No sir, I could not say definitely when I did approve it."

Q. "But you do remember, however, that when this bond was presented to you, that you objected to the form of it?"

A. "Yes, I have a distinct recollection of that."

Q. "And you at that time declined to approve it because it was different in form from the other depository bonds?"

A. "Yes, if I may explain, that is true." (Tr. p. 55).

"The clause which Glazebrook insisted must go into the bond is in substance what I stated *must be contained in it. I demanded this for the sake of uniformity in all the bonds.*" (Tr. p. 56).

BOND NOT OFFICIAL

Counsel quote statute (p. 12) and assert (p. 22) that this is an "official bond."

They cite no statute and no decision where statute is similar to that of Washington. No other statute contains the following provision, taken from Sec. 5076 of our Code, and which is not referred to

nor quoted by the trial court or counsel.

“The provisions of this chapter shall in no way relieve or release the County Treasurer from any liability on his *official bond* as such Treasurer, or any surety upon such bond, and shall in no way affect the duty of the several county treasurers of this state to give the bond as such treasurer now required by law.”

The bond runs to “J. L. Glazebrook, Treasurer of Pacific County.” It is not Glazebrook as Treasurer of the County, nor to the County. Glazebrook, and his “official bond” are expressly made liable for the money. While, under Kansas and similar statutes, deposit in certain banks is made mandatory and the treasurer is absolutely released when he deposits in the designated bank; and the relation the bank sustains to the county is that of debtor and creditor, the treasurer being absolved.

Under Washington statute, the bank does not become debtor of county. The condition of the bond is that the bank shall keep the money, “Subject at all times to the check and order of ‘J. L. Glazebrook, Treasurer’.” (Tr. p. 9). The county looks to Glazebrook, and his official bond as treasurer, and not to the bank. There is no privity between the bank and the county. The Treasurer, and not the bank, is the custodian. While, under the Kansas statute, the moment the treasurer deposits the money, the bank becomes custodian and liable directly to the county.

NO MEETING OF MINDS

There was never any meeting of the minds in this transaction, and that is a phase of the matter which counsel shrewdly avoid. In our opening brief we cited the record to show that Prosecuting Attorney, sent his deputy to see Glazebrook after the bank had failed. They found the bond there in the possession of Glazebrook. Both Glazebrook and the Prosecutor not only had failed to accept or approve the bond, but had rejected it, and on the 19th it was still lying in the private office of Glazebrook.

Counsel make much of the contention that Glazebrook could not legally have made deposit without this bond. He could legally make deposits *without any bond*, because his official bond is by the statute made liable for the money. Neither does the statute require him to deposit the money with the designated banks. Such deposit is merely permissive, not mandatory. He can deposit in any bank, or keep it in his own safe. There can be nothing in the contention that \$8000 was deposited on account of this bond, especially when the Trial Court refused to permit Glazebrook to answer the question, whether or not he did make this deposit on account of the bond (Tr. p. 34).

“I stated in the letter that the prosecuting at-

torney had refused to approve of the bond. I expected when I wrote this letter that the company would send a new bond." (Glazebrook's testimony, Tr. p. 48).

"I did not file the bond with the clerk because *the Company had not sent me bond carrying the clause outlined.*" (Tr. p. 50)

THERE WAS NO CONTRACT—NO BOND COMPLAINT STATES NO CAUSE OF ACTION

We earnestly urged this in our opening, and Counsel have ignored it.

The action is at law, and plaintiff must stand or fall upon the complaint. The only allegation as to purpose of bond is in Paragraph IV. (Tr. p. 4).

"To secure the sum and amount of the County's moneys and funds *to be deposited* in the said First International Bank."

The sole allegation as to moneys in the bank is: "That on the *19th day* of July there was on deposit \$52,497.97," and on the 17th this bank closed and on the 19th the bond was lying in Glazebrook's office. There was no allegation that a single dollar was deposited after any date at which they claim the bond *became effective, or while the bank was open*, and we objected to the introduction of any evidence under the complaint, and when evidence was offered of the

two \$4000 deposits, we objected especially (Tr. p. 51) to the introduction of the evidence, and have assigned its receipt as error; and we urge that this court cannot now consider those two deposits for any purpose.

On the point that the bond secured past deposits, Counsel quote copiously *Kephart vs. Buddecke*, 80 Pac. 501. We called attention to that case in our opening, and pointed out that the recitals in that bond expressly referred to moneys already on deposit. Counsel omit the recitals. The decision states that reference must be had to the recitals to determine what money is secured; and when these are consulted we find:

“That, whereas large sums of money *have accumulated* in the city treasury, which have been so deposited, and which may continue to so accumulate * * *”

In opposition to citation on construction, we quote the following from the Supreme Court of Washington:

“We have held that compensated sureties would not be heard to invoke the rule of *strictissima juris*, but our holdings have gone no further than to hold that such sureties could not claim the same rule of strict construction available to non-compensated or voluntary sureties or guarantors. When the contract is plain and unambiguous, or when its doubtful terms have been reconciled, whether by the one rule or the

other, this court has, like all others, held the parties to their contract; for as is said in the books, 'a surety is bound by the contract he made, and not by some contract which he did not make, even though the latter may be more favorable to him than the former.' Sureties and guarantors are not to be made liable beyond the express terms of their contract."

James Black Masonry & Contracting Company v. National Surety Company, 61 Wash. 479. (Wrongfully cited in opening brief as 51 Wash. 471).

We likewise direct the attention of the Court on this point and as to the obligation of the bond in such cases, to *Pacific County vs. Illinois Surety Company*, 234 Fed. 97, being the suit of the same plaintiff referred to in the briefs.

The Court, among other things, said:

"A surety company for a consideration is, however, entitled to have its contract interpreted by the ordinary rules of law. *Gilmore & P. R. Co. vs. United States Fidelity & G. Co.*, 208 Fed. 277, 279, 125 C. C. A. 477. And the liability cannot be enlarged beyond the scope of the terms of the contract, and where the language is unambiguous the question of construction does not enter."

The Court held that, giving effect to every part of the contract, it seemed clear that the Illinois Surety Company was released. The Maryland is as clearly so.

They say the letter of the 14th would have gone to Seattle in one day. The evidence is clear and positive that the letter did not reach Seattle until afternoon of 17th (Tr. pp. 57-58), and there is no evidence *when it was mailed*. Letters frequently are delayed in mailing.

They emphasize "Compensated Surety," but neither Glazebrook nor County compensated this surety. If any had been paid it would have been by the bank, not Glazebrook. The bank was attempting to procure a bond at its own expense, and Glazebrook is in no position to raise the question of Compensated Surety.

Why stultify? Why dissemble? An examination of the record must persuade that Glazebrook and O'Phelan never intended to accept the bond. *They had never before accepted such a bond*. After close of bank on 17th, they took stock on 19th and decided to try to hold both Maryland and Illinois Surety, and in neat-handed, fine fingered manner approved and filed the bond.

JOHN W. ROBERTS,

Attorney for Plaintiff in Error.

ROBERTS, WILSON & SKEEL,
Of Counsel.

1301 Alaska Building, Seattle.

No. 2948

IN THE

United States Circuit Court of Appeals

NINTH JUDICIAL CIRCUIT

JOHN FAIR NEW,

Plaintiff in Error,

—VS—

UNITED STATES OF AMERICA,

Defendants in Error.

OPENING BRIEF OF PLAINTIFF IN ERROR

Filed

MAY 14 1907

REISNER & HONEY, Attorneys

Attorneys for Plaintiff in Error.

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United States Circuit Court of Appeals

NINTH JUDICIAL CIRCUIT

JOHN FAIR NEW,

Plaintiff in Error,

—VS—

UNITED STATES OF AMERICA,

Defendants in Error.

OPENING BRIEF OF PLAINTIFF IN ERROR

This case comes here on a writ of error to the United States District Court for the Northern District of California, first division, granted September 29th, 1916. (Tr. 245). To review a judgment of said Court dated August 30th, 1916, (Tr. 81); sentencing plaintiff in error, (hereafter called defendant) to imprisonment for two years at McNeils Island, after a verdict finding him guilty of using the United States post office establishment in furtherance of a scheme to defraud divers persons. The indictment, (Tr. 4) which is divided into seven counts, charges defendants with using the post office establishment in the execution of a scheme to defraud. (The defendant, John Fair New, was charged and tried jointly with Marie T. Graham.) The defendant before this court was found guilty on the 2d, 3d, and 4th counts of the indictment and on the other counts not guilty; the defendant Marie T. Graham was found not guilty on all counts of the indictment.

The first count of the indictment sets forth; "that the defendants on the first day of January 1913, at San Francisco, then and there, being, had then and there devised a scheme and artifice to defraud various persons and the public generally; which said scheme to defraud was to be carried on by and through and by means of the post office establishment of the United States by opening and intending to open correspondence and communication with the said victims and by inciting said victims to open a correspondence through the said post office establishment, and that the post office establishment was then and there a part of said scheme to defraud, which said scheme and artifice, to defraud, was to be carried on and effected by the following means."

"That said defendants would pretend that defendant John Fair New, was a human being, who had attained the super-natural state of self-immortality in the body, by a course of righteous conduct consisting of abstinence from the use of meats of any kind as food; abstinence from the use of intoxicating liquor of any kind; abstinence from telling falsehoods and bearing false witness against his neighbor, and lastly by abstinence from the sin of committing adultery, by acts committed, evil desires, lustful eyes or otherwise." (Tr. 5)

"That such super-natural power had enabled him to conquer disease, death, poverty and misery; that this power could be transmitted by said John Fair New, to others who were willing to accept his teachings and pay therefor the sums demanded by him." (Tr. 5)

"That defendants did likewise pretend that said John Fair New was of divine origin and birth, a son

of the Holy Ghost, greater in authority, majesty and power than was Moses, Elijah, or John the Baptist; Yea, that the mantle of the "Man of Galilee" had fallen upon him and he had received the "keys to the kingdom of Heaven." (Tr. 5)

"That each and every one of these pretentions would be false and untrue and known by said defendants and each of them to be false and untrue; that said John Fair New had no super-natural power or authority of any kind or character, but was an imposter, an heretic, a seeker of vain-glory, a coveter of his neighbor's goods and his neighbor's wife and was also an habitual indulger in each and every of the sins and practices he pretended to condemn, to-wit: eating the flesh of animals, drinking intoxicating liquors, using profane language, telling falsehoods, bearing false witness and committing adultery." (Tr. 6)

"That the defendants in order to obtain money and other things of value from said victims would pretend that said John Fair New was the author of a large number of books, to-wit: 100 then published treating of the said super-natural gifts and power and its transmission to others; the said John Fair New not being then and there the author of said one hundred books, or any number of books, other than one book as the defendants then and there well knew and that volume consisting only of a small compilation of platitudes and garbled extracts from other works." (Tr. 6)

"That the defendants would organize in various cities of the United States, companies, associations and corporations of various kinds with the ostensible object of publishing and selling said one hundred

books, printing and publishing magazines, educating and instructing eligible persons and conferring upon them said super-natural gifts and powers above described and set forth; and that they would claim that said one hundred books were then being published and that said magazines were being published with the intention and purpose that the parties above named, to-wit: the victims and others, should invest money in stock and capital of said concern, and in subscriptions to said magazine, and purchase alleged courses of instructions in said super-natural powers and gifts; the defendant intending thereby to appropriate to their own use the sum and sums so invested, well knowing that no books of any kind other than the one volume above referred to, was being published, or was to be published, by the defendants and well knowing that no magazines were being published, or was to be published, by them, and also then and there well knowing that it was not the intention of said defendant or either of them to publish any books or magazines or give anything of value for said money invested; The true intention of said defendants being to appropriate to their own private use all money received and when said fraudulent acts became known to remove themselves to other cities of the United States and organize similar concerns and corporations and make the same false pretensions under the name of different corporations or associations and using assumed and fictitious names for themselves for such purposes." (Tr. 7)

"That it was a part of said scheme that defendants should advertise and claim that they had organized according to law, and were conducting according to law, an educational University which had for its

objects the instruction and graduation of eligible persons applying in the said art and power of supernatural healing and teaching; and that defendants should advertise that seventy free scholarships had been endowed by a man of great wealth and that those getting said scholarships would pay only ten dollars (\$10.00) for enrollment and five dollars (\$5.00) more on graduation; and that those students not possessing said scholarships would have to pay one hundred (\$100.00) dollars; the true intent and purpose of said defendants being as they well knew, to induce as many enrollments at (\$10.00) each as they could get; and that the victims might be induced to believe that a bargain of exceptional opportunity was being offered them to graduate and receive a lawful degree from said University, and might also be induced to invest money in said University; in exchange for an alleged position or office therein; the defendants then and there knowing that no scholarships of any kind were endowed and it was not their intention to limit the issue of said scholarship to seventy, or to any other number, and further then and there knowing that no efficacy or power was lodged in said teaching of said alleged University, and further well knowing that the said victims were not to receive and would not receive anything of value for the money so invested by them.” (Tr. 8)

“That it was a part of said scheme that defendants should make a false application of sections 602 and 602a of the Civil Code of the State of California, relating to the creation of corporations sole out of religious society in this; that defendants should pretend and claim for the purpose of inducing the said victims to invest money in the said corporations and

associations and subscribe for said magazine and take and pay for said scholarships and purchase said book; that the Newthot Church was a national organization consisting of many branches, situated in various parts of the world and that pursuant to the regular adoption of rules and regulations, a Newthot congress had been called and held in San Francisco; that the defendant, John Fair New under the name and guise of, Newi Newo New, has been elected head pastor or archbishop of said Newthot Church for life with the power of transmission by will, or otherwise, to his successors, of the powers so conferred and that among said powers so conferred on said head bishop, was the power to bestow the title of healer, pastor and bishop upon the graduates of said alleged University, and the investors in said corporations or associations and the subscribers of said magazine, and the purchasers of said scholarships and said book.” (Tr. 8)

“To that end said defendants should cause to be filed with the County Clerk of the City and County of San Francisco, State of California, an affidavit required by said sections 602 and 602a of the Civil Code of the State of California, showing that the defendant, John Fair New, had been regularly elected to said office as head bishop; that a position of pastor, healer, or teacher in said Newthot Church should be promised to said victims in order to induce them to invest their money in the various branches of said scheme above described; that defendants then and there well knowing that the Newthot Church, with which the defendant claimed to be identified, had no existence at any time or place, national or otherwise, and that no Newthot congress had been called or held

and that no machinery existed whereby such a congress could be called or held and that no material existed from which to convene such a congress and that said affidavit would be false and untrue; the true intention and object of the defendants being to falsely and fraudulently assume, claim, and pretend that the defendant, John Fair New, had attained power and authority to which he was, as defendants well knew, not entitled, and in fact did not possess, in order to obtain money and other things of value from said victims in connection with the above matter herein above set forth.” (Tr. 9)

“That on the 25th day of May 1911, defendant unlawfully caused to be placed and deposited in the post office establishment of the United States, a certain envelope addressed to Ira M. DeLong.” (Tr. 10)

The 2nd, 3d, 4th, 5th, 6th and 7th counts of the indictment are in the same language as the first count, above set forth, except that they charge the mailing of letters addressed to persons named in each of said counts. (Tr. 11)

2nd count, Tr. 11; 3d count, Tr. 14; 4th count, Tr. 17; 5th count, Tr. 20; 6th count, Tr. 22; 7th count, Tr. 25; On August 25, 1916, after a trial the jury rendered a verdict finding the defendant, John Fair New guilty under the 2d, 3d, and 4th counts, (Tr. 80.); and recommended him to the clemency of the court, and not guilty on the other counts.

The questions involved on this writ of error are:

1st. The order denying defendant's motion to quash.

2d. The order overruling defendant's demurrer.

3rd. The order denying defendant's motion for a bill of particulars.

4th. The order denying defendant's motion to dismiss, made on the ground that he had not been given a speedy trial.

5th. The admission of evidence over the defendant's objection.

6th. The order of Court refusing to direct a verdict of acquittal at the conclusion of plaintiff's case.

SPECIFICATION OF ERRORS RELIED UPON

1st. The first assignment of error is based upon the order denying defendant's motion to quash interposed on the ground viz.; that the names of the witnesses who testified before the grand jury were not appended to or indorsed upon the indictment. Tr. 86.

2d. The second assignment of error is based upon the order denying defendant's motion to quash made on the ground that the indictment contains irrelevant, immaterial and prejudicial allegations which constitute an attack upon the religious beliefs of the defendant. Tr. 86.

3d. The third assignment of error is based upon the order denying defendant's motion to quash made on the ground, viz.; that said indictment contains irrelevant, immaterial and prejudicial allegations which constitute an attack upon the teachings of the religious society or organization to which defendant belongs. Tr. 86.

4th. The fourth assignment of error is based upon the order denying defendant's motion to quash made on the ground viz.; that said indictment con-

tains irrelevant, immaterial and prejudicial allegations which constitute an attack upon the character of the defendant, JOHN FAIR NEW.

5th. The fifth assignment of error is based upon the order denying defendant's motion to quash made on the ground viz.; that said indictment charges the defendant, JOHN FAIR NEW, with depositing, and causing to be deposited in the mails, letters in furtherance in a scheme to defraud, where, in fact, said indictment alleges many schemes to defraud and does not specify in furtherance of which of these schemes said letters were so deposited in the mails. Tr. 87.

6th. The sixth assignment of error is based upon the order overruling the demurrer to the indictment interposed on the ground viz.; that said indictment does not state facts sufficient to constitute an offense against the laws of the United States, or any offense at all. Tr. 87.

7th. The seventh assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz.; that it cannot be ascertained from said indictment the nature of the supernatural powers alleged in said indictment to be claimed by the defendant JOHN FAIR NEW, by which he conquered death, poverty, disease and misery. Tr. 87.

8th. The eighth assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz.; that it cannot be ascertained from said indictment in what the defendant was an heretic, or against what established religion or church, the defendant is an heretic. Tr. 87.

9th. The ninth assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment what vain-glory the defendant, JOHN FAIR NEW, sought or how, or in what manner, he sought such vain-glory. Tr. 88.

10th. The tenth assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment how, when, or where, the defendant, JOHN FAIR NEW, was a coveter of his neighbor's wife, or what neighbor's wife. Tr. 88.

11th. The eleventh assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment when or where the defendant JOHN FAIR NEW, ate the flesh of animals, or what animals.

12th. The twelfth assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment when or where, the defendant, JOHN FAIR NEW, drank intoxicating liquors or what intoxicating liquors. Tr. 88.

13th. The thirteenth assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment when or where the defendant, JOHN FAIR NEW, used profane language or what profane language he used.

14th. The fourteenth assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment when or where the defendant, JOHN FAIR NEW, told falsehoods, or what falsehoods, and to whom he told them.

15th. The fifteenth assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment when or where, or in what court, the defendant, JOHN FAIR NEW, bore false witness, nor against whom he bore false witness.

16th. The sixteenth assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment when or where the defendant, JOHN FAIR NEW, committed adultery, or with whom he committed adultery.

17th. The seventeenth assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment what one book the defendant, JOHN FAIR NEW, was the author of, nor can it be ascertained what other works said one book was only a small compilation of platitudes and garbled extracts from, nor can it be ascertained therefrom what those platitudes and garbled extracts are.

18th. The eighteenth assignment of error is based upon the order overruling the defendant's demurrer

to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment the names of the various cities in the United States in which the defendant, JOHN FAIR NEW, is alleged to have organized companies, associations, and corporations, nor under the laws of what states and cities said corporations, companies, and associations were formed, nor the names of said companies, associations, or corporations. Tr. 89.

19th. The nineteenth assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment how, or in what manner, the defendant, JOHN FAIR NEW, intended to appropriate the sum, or sums, of money alleged in the indictment, to his own use. Tr. 89.

20th. The twentieth assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment what assumed or fictitious names the defendant, JOHN FAIR NEW, assumed for the carrying out of the purposes sought to be alleged in the indictment. Tr. 89.

21st. The twenty-first assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment how, or in what manner, the defendant, JOHN FAIR NEW, was going to, and did, advertise the organization and conducting of an educational university. Tr. 89.

22nd. The twenty-second assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment who was the man of great wealth who had endowed said university with seventy free scholarships. Tr. 89.

23rd. The twenty-third assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment when the defendant, JOHN FAIR NEW, should cause to be filed with the County Clerk of the City and County of San Francisco, State of California, an affidavit as required by section 602-602A, of the Civil Code of the State of California, or if so filed, when said affidavit was filed. Tr. 89.

24th. The twenty-fourth assignment of error is based upon the order overruling the defendant's demurrer of said indictment interposed on the ground, viz; that said indictment charges the defendant, JOHN FAIR NEW, with depositing, or causing to be deposited, in the mails, a letter in furtherance of a scheme to defraud, where, in fact, said indictment alleges many schemes, and does not state in furtherance of which of these schemes said letters were so deposited. Tr. 89.

25th. The twenty-fifth assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that said indictment is ambiguous for each and all of the reasons for which it is herein alleged to be uncertain. Tr. 89.

26th. The twenty-sixth assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that said indictment is unintelligible for the same reasons it is alleged to be uncertain and ambiguous. Tr. 89.

The twenty-seventh to fifty-fourth assignments of errors are directed at the other counts in the indictment and present the same points as are herein above specified, and it would only be repetition to set them forth in full.

55th. The fifty-fifth assignment of error is based upon the order denying defendant's motion for a bill of particulars in the following matters upon which a bill of particulars was demanded:

a. What is the nature of the supernatural powers alleged in said indictment to have been claimed by the defendant JOHN FAIR NEW, by which he conquered death, poverty, disease and misery.

b. In what is the defendant JOHN FAIR NEW, an impostor.

c. What vain-glory did the defendant JOHN FAIR NEW seek.

d. How did the defendant JOHN FAIR NEW seek vain-glory.

e. How did the defendant JOHN FAIR NEW covet his neighbor's goods.

f. Where did the defendant JOHN FAIR NEW covet his neighbor's goods.

g. When did the defendant JOHN FAIR NEW covet his neighbor's goods.

h. Who is the neighbor whose goods the defendant JOHN FAIR NEW is alleged to have coveted.

i. What goods of such neighbor did the defendant JOHN FAIR NEW covet.

j. How did the defendant JOHN FAIR NEW covet his neighbor's wife.

k. When did the defendant JOHN FAIR NEW covet his neighbor's wife.

l. Where did the defendant JOHN FAIR NEW covet his neighbor's wife.

m. Who is the neighbor whose wife defendant JOHN FAIR NEW is alleged to have coveted.

n. Who is the wife of such neighbor the defendant JOHN FAIR NEW is alleged to have coveted.

o. Of what animals did the defendant JOHN FAIR NEW eat the flesh of.

p. When did the defendant JOHN FAIR NEW drink intoxicating liquors.

q. What profane language did the defendant JOHN FAIR NEW use.

r. What falsehoods did the defendant JOHN FAIR NEW tell.

s. Against whom did the defendant JOHN FAIR NEW bear false witness.

t. In what court of tribunal did the defendant JOHN FAIR NEW bear false witness.

u. Where was the defendant JOHN FAIR NEW married.

v. When was the defendant JOHN FAIR NEW married.

w. Who is the wife of the defendant JOHN FAIR NEW.

x. From what other works was said "one" book only a small compilation of platitudes and garbled extracts.

y. What are the platitudes and garbled extracts which said one book is alleged to contain.

z. In what cities of the United States did the defendants organize companies, associations and corporations as alleged in the indictment.

al. What were the names of said companies, associations and corporations.

bl. When were said companies, associations and corporations organized.

cl. Where were said companies, associations and corporations organized.

dl. Under the laws of what states were said corporations organized.

el. In what manner did the defendants intend to appropriate to their own private use, the sum or sums of money so alleged in the indictment.

fl. To what other cities of the United States did the defendants intend to remove themselves when the fraudulent acts sought to be alleged in the indictment became known.

gl. What concerns and corporations did the defendants intend to organize in the alleged "other cities of the United States" to which the defendants are alleged to have intended to remove themselves.

hl. What were the names of said corporations and associations the defendants are alleged to have intended to organize.

il. What assumed and fictitious names did the defendants use.

jl. Where did the defendants use assumed and fictitious names.

kl. When did the defendants use assumed and fictitious names.

ll. Through what medium did the defendants intend to advertise the organization and conducting of an educational university.

ml. Where did the defendants intend to advertise the organization and conducting of an educational university.

nl. When did the defendants make a false application of sections 602-602A of the Civil Code of the State of California, or when did they so intend to make such a false application of said sections of the Civil Code of the State of California.

That the said afore-mentioned matters related to the general allegations contained in the indictment and it was impossible for defendant JOHN FAIR NEW to prepare his defense without the knowledge demanded in said items above set forth.

56th. The fifty-sixth assignment of error is based upon the order granting plaintiff's motion for a continuance of said trial on March 20th, 1916, in this that there was no legal showing made for such continuance and defendant's defense was prejudiced by such continuance.

57th. The fifty-seventh assignment of error is based upon the order denying defendant's motion to dismiss the indictment interposed upon the ground viz; that at the time said motion was made the defendant JOHN FAIR NEW, had not been given a speedy and public trial in accordance with the pro-

visions of the constitution of the United States and was therefore entitled to a dismissal of said indictment.

58th. The fifty-eighth assignment of error is based upon the admission of evidence over defendant's objection.

1. The court erred in admitting the following letter in evidence. This is the letter contained in the second count of the indictment. U. S. Exhibit 22.

July 8th, 1915.

Mr. Henry H. Doolittle,
511 So. Olive St.,
Los Angeles, Cal.

My dear Brother:—

We are in receipt of your valued favor of recent date and thank you very much for your cordial and fraternal words of welcome.

In answer to your question would say, that we have a fine copy of our three dollar book on THE NEWTHOT SCIENCE. This is the revised edition of the book we wrote you in regard to some time ago the price of which was two dollars. This book is handsomely bound in cloth and stamped in gold and sells for three dollars, but if you wish us to send it to you, you may send along the two dollars, and we will at once send it to you prepaid and call it square, as we are desirous of having you own a copy of this book which we feel that you will enjoy immensely.

With the hope of hearing from you soon, I remain, my dear brother and friend, always,

Faithfully thine in truth, love and peace,

(Signed) N. N. New, (Bishop THE NEW-
THOT TEMPLE, INC.,)

Palace of Education, P. P. I. E., San Francisco,
Calif.

2. The court erred in admitting the following letter in evidence. This is the letter contained in the third count of the indictment. U. S. Exhibit 23.

July 22nd, 1915.

Mr. Henry H. Doolittle,
511 So. Olive Street,
Los Angeles, Calif.

Dear Brother:

We are in receipt of your valued favor of recent date, making inquiry in regard to The Newthot Science, and in reply hasten to advise you that we will send you a copy of the paper bound edition containing 408 pages, on receipt of \$1.00 by prepaid parcel post. This book contains the element of all of the 100 books on the Newthot Science. I note all you say, and appreciate every kindly word. We are very busy here in connection with the Newthot Science Exhibit, having thousands of callers who are interested in the Newthot Science.

If you prefer, we will send you a copy of the cloth edition for \$2.00, but as you say the paper-bound edition will answer the same purpose, as it is exactly the same save in the binding only. We are sure that you will be pleased with this work, and sure that if you will follow its teachings it will add years to your life and life to your years. We hope that you can arrange matters so that you can visit the fair and also the Newthot Science Exhibit.

Hoping to have the pleasure to hear from you soon again, we are my dear sir and brother, always,

Faithfully thine,

(Signed) N. N. New, President."

3. The court erred in admitting the following letter in evidence. U. S. Exhibit 24.

San Francisco, May 28, 1914.

Dear Friend:

This Letter of Appointment is to inform you that Dr. New will teach a class of seventy students, in our Extension University, and your name has been selected as a worthy beneficiary for one of the 70 free scholarships, as described in The Newthot University Circular enclosed herein.

This scholarship will entitle you to take the Complete Course leading to the Degree of Doctor of Newthot, D. N. in your own home in two to three months, according to spare time devoted to study.

The Degree of Doctor of Newthot, D. N. is a license to teach, preach and practice The Newthot Science in all the states, territories, colonies and dependencies of the United States, and all foreign countries and to heal all manner of ills to which humanity is heir, without resort to *Materia Medica* in any form.

This class will be personally conducted by Dr. New, Head of The Newthot University Corporation, and Chairman of The Newthot World Congress to be held in this city in 1915, when all Newthot graduates will be invited to come and take part in the deliberations of this Convention.

The regular tuition for the complete course is \$100 but scholarship students are only required to pay the usual Enrollment, \$10, and diploma, \$5, to cover the incidental expenses.

The Enrollment is payable at the time of beginning the course, and diploma, at the time of graduation. All that is necessary is to enclose the Enrollment fee with your application, and we will begin at once. This includes textbooks, lessons, instruction and examinations leading to graduation for the Doctorate Degree.

A suitable location will be reserved for each graduate who will be assigned to that position as a Newthot Science teacher, lecturer, and practitioner immediately upon graduation. We will hold this scholarship for you until we have had time to receive your acceptance.

An early response is desired in order that this scholarship may be placed at the earliest possible date.

Faithfully Yours,

THE NEWTHOT UNIVERSITY, Inc.,

By J. F. New Jr., Sec'y.

N. B. In your reply refer to scholarship No. 37 reserved for you. Make all funds payable to The Newthot University, and remit by Post Office Order, Express Order, Bank Draft, or Certified Check as banks charge on personal checks.

4. The court erred in admitting the following letter in evidence. U. S. Exhibit 27.

The Newthotist Monthly Devoted to the New-life of Health, Happiness, Prosperity, Longevity, Immortality, Eternal Youth, Beauty and Peace.

THE NEWTHOT MAGAZINE

Dr. N. N. New, Editor; Contributing Editors from All Parts of the World; C. R. Evans, Business Mgr.

No. 2, Golden Gate Ave.,
San Francisco, California.

Having learned that you are interested in Newthot, we are taking this means of announcing the publishing of THE NEWTHOT MAGAZINE in San Francisco by Dr. N. N. New.

The object of this magazine is to teach that correct methods of living and thinking will overcome all existing evil conditions and to spread broadcast the TRUTHS that will result in per-

petual health and happiness to all.

Authorities from all parts of the world will contribute to this publication and every phase of Newthot Science and Philosophy will be dealt with in our columns.

The Subscription rates are, 50 cents for 12 months or \$1.00 for three years and if you will send your subscription in so that it will reach us on or before May 1914 together with a short list of names of persons who might be interested in THE NEWTHOT MAGAZINE we will send you ABSOLUTELY FREE by return mail, a copy of "NEWOLOGY," Dr. New's splendid book on Newthot Science.

The supply of these books is limited so this offer can not be extended beyond the above date.

Yours very truly,

THE NEWTHOT MAGAZINE,

Per.....

Business Manager.

CRE. MBK

5. The court erred in admitting in evidence U. S. Exhibit 28, consisting of eighty-five letters which are too cumbersome to set forth and we therefore request the court to consider this exhibit in its original form.

6. The court erred in admitting the following letter in evidence, U. S. Exhibit No. 30.

Tel. Spring 6700

Home Office

THE NEWOLOGICAL INSTITUTION

The Newology Institute

The Newologist Movement

Dr. J. F. New, Leader

The Newologist Magazine

Official Organ

Headquarters: Broadway Central Hotel
673 Broadway, New York

June 15, 1910.

Mrs. Charlotte A. Scott,
Bloomington, Ill.

Dear Friend:—

We take this opportunity of seeking your co-operation and soliciting your suggestions and interest in the advancement of The Newlife Cause.

Our Leader, Dr. J. F. New, has discovered a vital truth of the greatest moment to Humanity, and you and your friends are cordially invited to join him in his efforts to attain the Newlongevity, Health, Happiness and Beauty of the race.

We shall be glad to hear from you, and if possible have you call and meet Dr. New and talk the subject over as to how we can best conserve the interests of The Newlife Movement.

It is an independent movement for the elevation of men and women to a higher sphere of existence here and now. "Come let us reason together." If you will kindly write or phone as to when it will be convenient for you to call we will arrange for an interview with Dr. New.

Respectfully yours,

Ida B. Stetson, Sec'y.

7. The court erred in admitting the following letter in evidence. This is the letter contained in the fourth count of the indictment. U. S. Exhibit 33.

August 21st, 1915.

Dr. A. B. Stacy-Spear,
1023 S-Grand Ave.,
Los Angeles, Cal.

Dear Friend:

It has been our custom from year to year to confer the honorary degree of DOCTOR OF NEWTHOT upon one or more worthy persons in each state and foreign country who have distinguished themselves in advanced thot for the

propagation of the race and therefore, upon the nomination and recommendation of Dr. N. N. New, by virtue of the power vested in THE NEWTHOT UNIVERSITY, an Educational Corporation for the promotion of the study and practice of THE NEWTHOT SCIENCE, The New Psychology for the redemption of humanity from error, age, poverty, disease and death, and the establishment of The Newlife of health, happiness, prosperity, longevity, immortality, youth, beauty, and peace upon the earth;

We hereby confer upon you the Degree of Doctor of NEWTHOT, D. N., and create you a Newthotist in consonance and in consideration of meritorious work and service in the promulgation of truth and the elevation of humanity to a higher sphere of existence, and authorize you to wear the honor and title D. N. (Doctor of Newthot) in recognition of the distinction and honor bestowed upon you.

The Document admitting you to the Doctorate Degree and creating you a Newthotist is enclosed herewith. This is the highest distinction and honor conferred by this institution, and we believe that in conferring this title upon you, all the world shall say, "It is well."

THE NEWTHOT SCIENCE WORLD CONFERENCE will be held in this City in conjunction with the Panama Pacific International Exposition to which you are invited to take part in the deliberations as well as address the Convention.

With many kind wishes for you and yours, we are always,

Faithfully thine in peace, truth and love,

(Signed) J. F. New, Jr., Vice-President.

N. B. The President sends Newthot Greetings and most cordially INVITES YOU TO SPEAK and also take part in a Symposium at the First Session of the First Day of THE NEWTHOT

SCIENCE CONGRESS to be held in San Francisco, Sept., 6-12. Kindly send in your subject to be entered on program by return mail and oblige,

Secy."

59th. The fifty-ninth assignment of error is based upon the order of the court denying defendant's motion to direct a verdict of acquittal.

All of the foregoing assignment of errors were duly excepted to by the defendant and we will fully set forth the ground upon which the motions were based and the objections made in our discussion hereinafter set forth.

FIRST POINT

The motion to quash should have been granted because the indictment is a direct attempt to prohibit the defendant from the free exercise of his religious beliefs and is also an attack upon the teachings of the religious establishment to which defendant belongs.

The indictment first proceeds to charge defendant with pretending to have attained immortality in the body by a course of righteous conduct, consisting of abstaining from numerous sins. The indictment does not allege that defendant pretended to have any supernatural powers at all, but merely alleges that he pretended to have attained the supernatural state of immortality in the body by a course of righteous conduct. In spite of the fact that the indictment does not allege that defendant pretended to have supernatural powers, it nevertheless proceeds to allege "that such supernatural power had enabled him to conquer disease, death, poverty and misery," and this power could be transmitted to others. It then alleges that defendant pretended that he was of di-

vine origin and birth, a son of the Holy Ghost, greater in authority, majesty and power than was Moses, Elijah and John the Baptist, "Yea, that the mantle of the Man of Galilee" had fallen upon him and that he had received the keys to the kingdom of Heaven; that all of these pretensions are untrue; that defendant is an imposter, an heretic, a seeker of vain-glory, a coveter of his neighbor's wife and his neighbor's goods; that he was an habitual indulger in all the practices he pretended to condemn, to-wit: eating meat, drinking intoxicating liquors, using profane language, telling falsehoods, bearing false witness, and committing adultery.

In the face of these allegations, and especially the allegation that defendant is an heretic, it cannot be successfully contended by the district attorney that the indictment is not an attempt to prevent defendant from the free exercise of his religious beliefs. Even if the charge of heretic was omitted the indictment on its face clearly indicated that it is an attack upon the religious beliefs of the defendant.

The first amendment to the constitution of the United States (Dec. 15, 1791) grants to every citizen the right to profess and embrace whatever religion he shall deem true, and when Congress enacted Section 215 of the Criminal Code it never intended to abridge the constitutional right of religious freedom, nor did it intend that the section should be an instrument whereby a citizen could be deprived of this right, guaranteed by the constitution merely because some people cannot tolerate the religious faiths of others. Toleration is the watchword of the constitution. Our first President said "The government of the United States of America is not in any sense

founded upon the Christian religion," and "Error of opinion may be tolerated where reason is left to combat it." The great majority of people in the United States believe in a Supreme Being or a God, but they have many divers ways and methods of worship, each of which is a scheme whereby they expect or hope to attain either spiritual or physical immortality. It would be useless for us to attempt here to enumerate any of these various methods of worship because the court is not concerned with the particular religious beliefs of various people, nor is the religious beliefs of any man the subject of inquiry by the courts of this country. Nevertheless, this defendant is charged with professing religious beliefs contrary to the established and prevailing religious institutions; if his religious beliefs are such that he feels justified in believing that by a course of righteous conduct he has attained immortality in the body, the right to this belief is guaranteed to him under the constitution and is supported by the Holy Bible. Tr. 183. Surely such a claim could not mislead nor deceive any normal person.

Is it not just as elevating and plausible to claim that by the abstinence from sin you have attained physical immortality as to claim that if you do sin you will suffer the damnation of Hell?

Is it not just as elevating and plausible for a human being to claim that by the abstinence from sin he has attained physical immortality as to claim that he can forgive your sins for a consideration?

Is it not just as plausible to make the claim this defendant is charged to have made, as to claim that a person can be transferred from one sphere to another after death or to claim that there will be a

physical resurrection after death, or to claim that any man is a direct representative of God on earth or many of the other doctrines of various religious societies?

We are all of divine origin and birth, if the Holy Bible is to be believed, born on an equal plane, possessed before God with equal rights, endowed with equal powers to determine righteousness from unrighteousness, and possess the keys to the kingdom of Heaven. These gifts and powers we inherit from him who rules over the destinies of all, yet in this day of our Lord, 1917, a citizen of the United States of America stands charged with claiming that he is of divine origin and birth, a son of God, an impostor, an heretic, a seeker of vain-glory, and almost every thing else of which the human race is heir. Is this our freedom of religion? Are we to have a censor who shall say what religious book may be sold, and what we may buy, what we should believe and what we should not believe? And who is thus to dogmatize religious opinions for our citizens? Millions of innocent men, women and children, since the beginning of Christianity, have been burned, tortured, fined and imprisoned for being heretics, and if this indictment is allowed to stand the test of our courts, it will be the first step on the road leading back to those days of religious intolerance.

If the district attorney attempts to argue that this indictment is not intended to attack the religious beliefs of the defendant, we will call the courts attention to the bill of particulars where he states that "The defendant, JOHN FAIR NEW, is an heretic for the reason that he believes in a doctrine contrary to the established faith of prevailing religions, to-

wit: "The immortality of the body, which is against the Roman Catholic religion, the Episcopal, Presbyterian, Baptist, and other churches." Tr. 78.

The whole indictment is predicated upon these allegations attacking defendant's religion which are prejudicial on their face, and in violation of the constitutional rights of religious freedom. We have diligently searched through all American decisions rendered since the formation of our government, and confess that we have not been able to find any authority, or a single case where a man has been charged with being a heretic, a seeker of vain-glory, a coveter of his neighbor's goods and his neighbor's wife, or pretending that he was of divine origin and birth, or possessed the keys to the kingdom of Heaven, and we venture to say that no such case can be found.

These allegations were evidently inserted in the indictment for the purpose of prejudicing the defendant in the mind of jurors, or those who could not tolerate his religious beliefs. Certainly they had that effect, even if not so intended. Where there is prejudice, it is no use to argue. What are these allegations but an acknowledgment of religious prejudice? The conclusion is irresistible and we therefore claim that the court erred in denying the motion to quash the indictment interposed on the ground herein set forth.

We are not unmindful of the rule that religious belief cannot be accepted as the justification of an act made criminal by the law of the land such as bigamy, adultery, working on Sunday where the law prohibits such working, etc. In such cases it is obvious that a man would not be permitted to excuse his crime by claiming that his religious belief justi-

fied his action. We contend, however, that being an heretic is not a crime and is not a subject of inquiry by a Court of Justice. It is on the contrary a charge most prejudicial in its nature, attacking defendant's religious belief. History discloses instances where innocent people have been murdered because they were heretics and the guilty were not punished but praised rather for their good work in aiding the extermination of heretics. That day, however, has past and we venture to say that the day when a man can be charged in a court of Justice with being an heretic has also past. If not, there is no religious freedom. The district attorney cannot pass this lightly and claim that it is surplusage for it is not surplusage, it is substance; it was read to the jury, it was before the jury, it was made an issue in the case, and it aided in convicting defendant. Certainly it prejudiced the defendant before the jury and would likely prejudice any defendant before a jury especially where, as in our country, religious beliefs in no case disqualify a juror from acting as such. There can be no justification for this charge of heretic. It was inserted in the indictment for a purpose and the only purpose which it could possibly have had was to prejudice the jury against the defendant. Surely it is not possible in this day and age of enlightenment to allege matter in an indictment prejudicial in its nature and then after it has been before the jury, read to the jury and considered by the jury, claim that the defendant was not prejudiced because the charge of being an heretic was surplusage and consequently had no place in the indictment. This would be a mockery of justice. This would permit a man to be charged with one thing and convicted of another, charged with forming a scheme and con-

victed of being an heretic and after conviction we find the prosecuting attorney hiding behind the general verdict and seeking to have it affirmed by claiming it was not intended to convict the defendant of being an heretic even though it was so charged. He will ask the court to say (it is true defendant was charged with being an heretic but he was also charged with forming a scheme and we must assume that he was convicted of forming the scheme) when as a matter of fact he was convicted by the jury of being an heretic and was acquitted on the charge of forming a scheme. This court cannot ascertain upon what charge the defendant was convicted unless it were possible to call the jurors and ask them what they considered in arriving at their verdict. Therefore we claim that where a defendant is charged in an indictment with prejudicial and illegal matter which is absolutely opposed to the spirit and terms of the constitution of the United States, the whole indictment is bad and should be quashed even though it charged other matter, which, standing alone would be perfectly legal.

SECOND POINT.

The court erred in overruling the demurrer to the indictment for the reason that the charges alleged therein consists entirely of general allegations and conclusions of law which were so uncertain ambiguous and unintelligible that it was impossible to prepare a defense thereto.

The particulars of the scheme are matters of substance and must be set out with sufficient certainty to show its intent and character and to fairly acquaint the accused with what he is required to meet and the essential elements of the offense must be set out

with such reasonable particularity of act, intent, time, place and circumstances as will apprise the accused of the charges, to the end that he may prepare his defense and also enable him to plead his conviction or acquittal as a bar to any subsequent prosecution for the same offense.

Brooks v. U. S., 76, C. C. A. 581, 146, Fed. 223.

U. S. v. Hess, 124 U. S. 483, 31 L. Ed. 516.

Stokes v. U. S., 157 U. S. 187, 39 L. Ed. 667.

Stewart v. U. S., 55 C. C. A. 641, 119 Fed. 89.

Miller v. U. S., 66 C. C. A. 399, 133 Fed. 337.

Foster v. U. S., 178 Fed. 165.

The indictment does not allege that defendant claimed to have any supernatural powers of any kind or at all. It does allege that he claimed to have attained physical immortality by a course of righteous conduct, but nothing is alleged from which it could even be inferred that defendant claimed to have supernatural powers, yet nevertheless the indictment goes on to allege that "such supernatural powers had enabled him to conquer disease, death, poverty and misery." (Tr. 87). It is apparent that the nature of these powers should have been stated so that we could intelligently prepare our defense. This it did not do, and consequently the defense was prejudiced by the omission.

It is charged that defendant was a "seeker of vain-glory" and it was impossible for us to tell how, or in what manner, it was claimed he sought vain-glory as no facts were alleged upon which this conclusion could be predicated and we could not tell what we would be required to meet until the evidence on this point was actually introduced. This argument applies with equal force to the charge that defendant

was a coveter of his "neighbor's wife and his neighbor's goods". We are entitled to know how, when and where defendant coveted his neighbor's wife and what neighbor's wife. We could not prepare our defense to this charge until we were intelligently informed of the time, place, manner and circumstances of the charges. These matters were evidently within the knowledge of the district attorney when the indictment was returned and should have been stated in order that defendant would know what evidence he would require to combat them. No man should be compelled to go to trial on an indictment that does not inform him of the time, place and circumstances of the acts charged therein. Defendant was also entitled to know what animals he was charged with eating the flesh of, what intoxicating liquors he drank, what profane language he used, what falsehoods he told, against whom did he bear false witness, in what court did he bear false witness. These are all conclusions in the indictment without any support in fact and which the defendant could not possibly prepare to meet without being informed of the manner, time and circumstances of the conclusions alleged. It is charged that defendant committed adultery. This is a mere conclusion of law but if such an allegation is permissible the defendant was entitled to know when and where it was claimed he was married, and who was claimed to be his wife. "Adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife." (Civil Code Cal. Section 93). In order to show defendant's adultery, it was necessary to show that he was married and certainly he was entitled to know when and where it was claimed that he was married and who was claimed to be his wife. It is

charged that defendant is the author of one book, but that that book is only a small compilation of platitudes and garbled extracts from other works. Surely defendant was entitled to know from what other works it was claimed this book was only a small compilation of platitudes and garbled extracts. If it was known that this book was composed of garbled extracts from other works, defendant should have been informed of such works so that he could meet the charge. Evidently these facts were known to the district attorney or he could not have alleged them as conclusions. With allegations of this kind, surprises without number could be sprung during the trial, but if the defendant was fully notified of the facts before the trial, he might be able to show that the other works were only garbled extracts from his book, or, in any event, he could intelligently prepare a defense to the indictment.

Defendant was entitled to know the names of the corporations, companies and associations he was alleged to have organized. Without this information how could any man be prepared for trial on a general charge of this kind? The prosecution could introduce evidence of the remotest nature in a charge so general and defendant would be far at sea until such evidence was actually introduced when it would be too late to prepare to meet it. The same can be said about the allegation that defendant used assumed and fictitious names for the carrying out of the purpose sought to be alleged in the indictment. How could defendant determine in advance of the trial, what assumed and fictitious names the prosecution was going to claim he used? And consequently, how could defendant prepare his defense before he knew what would be urged against him? This seems

so plain that further argument and illustration would appear out of place.

It is alleged that defendant intended to make a false application of Section 602-602A of the Civil Code of California. We could not determine from this allegation, whether they were going to claim when this false application was made, whether one, two, three, or four years before the indictment was returned and therefore it was impossible to prepare a defense on this charge. Under this indictment it would be absolutely impossible for defendant to plead a conviction or acquittal in bar of another indictment for the same offense. A dozen different indictments could be drawn from the matter set forth in these general allegations and conclusions. It would only be necessary to omit the general allegation and conclusion and set forth the actual facts or particulars of the various matters sought to be alleged in these conclusions and when that was done the court would never know, nor could it ascertain whether the facts alleged cover the general allegations set forth in this indictment. The particulars of the scheme being matters of substance and not having been set forth as the law requires it follows that the court erred in overruling the demurrer to the indictment, and it cannot be claimed that the defects in the indictment could have been cured by a demand for a bill of particulars, because defendant demanded a bill of particulars as to all matters heretofore discussed and the demand was denied as will more fully appear in the next point urged.

THIRD POINT.

The court erred in denying defendant's motion for a bill of particulars as set forth in assignment of error number 55, ante p. 14.

The indictment is almost entirely composed of general terms and conclusions which made it impossible for defendant to prepare his defense thereto without being informed of the particulars demanded.

The motion was supported by affidavits. (Tr. 49.) The constitution of the United States requires that the accused should be informed of the charge against him and if the indictment in this case did not intelligently inform the defendant of the acts which he was accused of, then it is fatally defective unless cured by the furnishing of a bill of particulars. In this case a bill of particulars was demanded and the demand was almost wholly denied. The following is a resume of the particulars defendant demanded and the court denied. What is the nature of the supernatural powers by which defendant conquered death, poverty, disease and misery? In what is he an impostor? What vain-glory did he seek? How did he seek vain-glory? How did he covet his neighbor's goods? When did he covet his neighbor's goods? Where did he covet his neighbor's goods? Who is the neighbor whose goods he coveted? What goods of his neighbor did he covet? How did he covet his neighbor's wife? Where did he covet his neighbor's wife? Who is the neighbor's wife he coveted? Who is the wife of such neighbor he coveted? What animals did he eat the flesh of? When did he drink intoxicating liquors? What profane language did he use? What falsehoods did he tell? Against whom did he bear false witness? In what court or tribunal did he bear false witness? Where was the defendant married? When was the defendant married? Who is his wife? From what other books was said one book only a small compilation of platitudes and garbled extracts?

What are the platitudes and garbled extracts which said one book contains? In what cities of the United States did defendant organize companies, associations and corporations? What were the names of said companies, associations and corporations? When were said companies, associations and corporations organized? Where were they organized and under the laws of what states were they organized? To what states did the defendants intend to remove themselves? What concerns and corporations did they intend to organize in other cities of the United States and what were the names of said corporations they intended to organize? What assumed and fictitious names did defendant use? Where did he use assumed and fictitious names? When did he use assumed and fictitious names? Where did defendant intend to advertise the organization and conducting of an educational university? When did defendant make a false application of section 602-602A of the Civil Code of the State of California or when did he so intend to make false applications?

It can readily be seen from the foregoing statement of particulars demanded that the indictment contained, and was almost entirely composed of, allegations in general terms and allegations of conclusions, making it utterly impossible for a man of ordinary intelligence to prepare a defense to it.

The argument presented in support of the demurrer to the indictment applies with more force to the motion for a bill of particulars and practically every point raised by the demurrer is also raised by the motion for a bill of particulars. All of the matters upon which a bill of particulars was demanded were matters of substance, were issues in the case, were considered on the trial and were before the jury.

In support of this point we present all of the authorities cited on our second point. Further argument on this question seems to us unnecessary as it must be apparent from the face of the indictment alone that it would be practically impossible for any defendant to properly prepare a defense thereto without the information demanded by the motion for a bill of particulars.

FOURTH POINT.

The court erred in denying defendant's motion to dismiss the indictment interposed on the ground that he had not been given a speedy trial within the meaning of the sixth amendment to the constitution of the United States which provides that the accused must be given a speedy and public trial.

Defendant was indicted on October 29, 1915, and was taken into custody on November 1, 1915; he entered a plea of not guilty on November 20, 1915, at which time the cause was set down for trial for February 14, 1916. On November 27, the prosecution moved for a continuance of said trial and the same was granted to the 20th day of March, 1916. On said 20th day of March, 1916 the prosecution moved for another continuance of the trial and presented an affidavit in support of the continuance (Tr. 54). Defendant objected to this continuance and to the sufficiency of the affidavit setting forth the ground for a continuance and presented affidavits in support of the objection (Tr. 56-57). The motion for a continuance was granted and the cause continued to April 3, to be re-set for trial. On April 3, upon motion of the prosecution the case was continued to April 10, to be set and on April the 10th on motion of the prosecution and over the objection of defend-

ant, the court continued said cause to July 10, to be set. On April 26, defendant moved the court to dismiss the indictment and in support of said motion presented affidavits setting forth the facts above stated (Tr. 72) together with other facts showing that defendant had not been given a speedy trial and that a further continuance of the matter would deprive him of the right to properly present his defense (Tr. 72).

There was no legal showing made on the part of the prosecution which justified the order of March 20, 1916, continuing the trial of said cause. On the other hand, the affidavits presented by the defense showed clearly that if the trial was continued it would prejudice the defendant to such an extent that he would not be able to properly present his defense. The action of the court in granting this continuance we believe should be taken into consideration in deciding whether the court erred in denying the motion to dismiss. From the time defendant was indicted to the 10th day of July, a space of about eight months, he was ready, willing and anxious to be tried. The court was ready to try the case at any time during said eight months and all delays were granted at the instance and for the convenience of the district attorney.

The constitution guarantees a speedy and public trial to every defendant. Therefore the question to be decided is what constitutes a speedy trial within the meaning of the sixth amendment to the constitution, in other words, can a trial of a cause be delayed for eight months over the objection of the defendant merely to suit the convenience of the district attorney?

The constitution of California, Section 13 of Art. I, guarantees a speedy trial to every person accused of crime and the Legislature has determined what it meant by a speedy trial by enacting section 1382 of the Penal Code which provides that a defendant must be brought to trial within sixty days, so therefore the Legislature, in construing the provision of the constitution providing for a speedy trial, has determined that unless the trial is had within sixty days after the indictment is returned the trial is not speedy within the meaning of the constitution.

People v. Morina, 85 Cal. 515. *People v. Buckley*, 116 Cal. 151. *Nixon v. State*, 41 Amer. Dec. 604 and note thereto. *U. S. v. Fox*, 3 Mont. 512. The last cited case was decided by the U. S. court before Montana became a State. The case is directly in point on principle and amply supports our contention that defendant was not accorded a speedy trial in the case at bar.

We think it would be only reasonable to say that four months is ample time to prepare a case of this nature for trial and that this would be only a reasonable construction of the constitutional provision of a speedy trial. This is double the time allowed by statutes in most of the states. (*Nixon v. State supra*) these statutes were only enacted for the purpose of carrying out the spirit of the constitution. If this question was presented to Congress, we believe that they would in no event, set more than four months as a standard time within which an accused should be brought to trial. It is not reasonable nor just to keep a defendant under indictment for eight months when he is willing and anxious to go to trial at all times and the court is willing to proceed with

the trial, merely to suit the convenience of the district attorney. This would be giving the district attorney arbitrary power to keep a defendant under indictment at his pleasure.

Judge Cooley, on constitutional limitations, page 382, 4th edition says:

“Again it is required that the trial be speedy; and here also the injunction is addressed to the sense of justice and sound judgment of the court. In this country, where officers are specially appointed to represent the people in these prosecutions, their position gives them an immense power for oppression; and it is to be feared they do not always sufficiently appreciate the responsibility, and wield the power with due regard to the legal rights and privileges of the accused.
* * * When a person charged with crime is willing to proceed at once to trial, no delay on the part of the prosecution is reasonable except that which is only necessary for proper preparation and to secure the attendance of witnesses.”

It is therefore apparent that defendant was not given a speedy trial within the meaning of the constitution of the United States, and the court erred in denying his motion to dismiss the indictment.

FIFTH POINT.

The court erred in admitting in evidence over defendant's objection U. S. Exhibits Numbers 22, 23, 24, 27, 29, 30, and 33 as set forth in assignment of errors number 58, ante p. 18.

1. U. S. Exhibit No. 22 purported to be the letter contained in the second count of the indictment (Tr. 13) and the objection by defendant to its admission was that it was not properly identified as a letter coming from defendant (Tr. 159). There was no

evidence to show that defendant wrote this letter or deposited it in the mail, that the signature was that of defendant's, or that he ever saw the letter before. The only evidence offered for the purpose of identifying the letter as coming from defendant or for any other purpose was that the witness received the letter through the mail and forwarded it to the district attorney at his request several months before it was offered in evidence. The witness could only testify that he thought that it was the same letter he received through the mail (Tr. 158).

There should be some evidence identifying the defendant with the mailing of this letter or causing it to be mailed, in the absence of which it was manifest error to admit it in evidence against him. If a letter set forth in an indictment can be admitted in evidence against the accused without in any manner showing his connection with, or causing, it to be mailed then it would be possible to convict him without any evidence at all. The mere fact that a letter is received through the mail purporting to come from the accused, does not show that he mailed or caused it to be mailed. Proof that he signed it or caused it to be signed or caused it to be mailed or that it was mailed with his knowledge or that he was so situated that he should have known it was mailed, is, and should be, essential before it is admitted in evidence against him. No such evidence was introduced in this case.

2. U. S. Exhibit No. 23 as set forth in assignment of errors, ante p. 19, was the letter contained in the third count of the indictment (Tr. 16.). The objection to this letter was the same as the objection to U. S. Exhibit No. 22. (Tr. 159) and the evidence

introduced was the same as that introduced to identify U. S. Exhibit No. 22 above discussed. A further discussion of this exhibit would be repetition of the discussion of U. S. Exhibit No. 22 so we present the same argument and refer the court to that discussion, ante p. 41.

3. U. S. Exhibit No. 24 as set forth in assignment of errors, ante p. 20, purported to be a circular letter sent to the witness by defendant. The objection to this letter was that the letter had not been identified as coming from defendant (Tr. 160). The witness merely stated that he did receive a letter similar to this through the mail; that it came along with the other letters. Inasmuch as the objection and evidence on this point is the same as that discussed in considering U. S. Exhibit No. 22, we refer the court to that discussion and ask the court to consider it as applying to U. S. Exhibit No. 24. Ante p. 41.

4. U. S. Exhibit No. 27 as set forth in assignment of errors, ante p. 21, we will discuss when discussing U. S. Exhibit No. 28.

5. U. S. Exhibit 28 is not set forth in the assignment of errors because it is too cumbersome to print. It contains eighty-five typewritten letters which purport to be copies of letters found in defendant's possession shortly after he was arrested under the indictment in this case. The original exhibit has been forwarded to this court as a part of the record and we pray that the court will consider it in its original state. (It may be well to here state that all of the original exhibits have been transferred to this court as a part of the record). We will now consider Exhibits 27 and 28 together. The same objection was made to each exhibit. The objection to the admis-

sion of these letters was made on the ground that they were incompetent, irrelevant and immaterial and in no way tending to prove any issue in the indictment; that it had not been shown that defendant had ever sent any of the letters through the mail or that they were ever written at his request, or that they were ever used for any purpose, and further to the admission of these letters in a bunch (Tr. 161). The witness testified that he was permitted to go through all of defendant's papers in the booth at the Fair grounds; that he selected these papers from among the papers there at the booth; that defendant did not want to let him have some of the papers (Tr. 161).

The mere fact that these papers were found in a place conducted by the defendant does not show that defendant ever used them in any manner or that they were ever written at his request, nor that he ever used these letters in any manner, shape or form.

Letters written to defendant containing intimation that defendant's business was conducted by dishonest methods which letters defendant never answered are not admissible in evidence. *Marshall v. U. S.*, 197 Fed. 511, 117 C. C. A. 65. If letters written to defendant in connection with his business and found in his possession are not admissible in evidence, surely it cannot be said that a large batch of letters such as these could be admitted without showing that defendant had in some way used these letters for the purpose of carrying out his scheme which he is alleged to have formed.

If it be contended that these letters were copies of letters sent to various people then they were incompetent, first, because it was not shown that defendant used the letters for any purpose, second, because the

originals were not accounted for. No rule of evidence is better settled than that if copies of letters were offered the originals must be accounted for. Certainly it should have been shown that defendant sent the originals before the copies were admitted against him, and in any event it should have been shown that these letters or the originals thereof were a part of the scheme and that defendant used them, or authorized their use or knew that they were used in the forming of a scheme. Otherwise, the letters were mere hearsay and inadmissible for any purpose whatsoever.

6. U. S. Exhibit No. 30 as set forth in assignment of errors, ante p. 22, is a letter written by a witness to a party other than the defendants. The witness testified that she wrote this letter in 1910 (Tr. 169). The objection was that the letter was incompetent, irrelevant and immaterial and tending to prove no issue in the case (Tr. 169). This letter was incompetent because it is nothing more than a self-serving declaration. The letter was written to a man named SCOTT and it was not shown that defendant knew anything about the letter or had any connection with the transaction in any manner. A mere statement of this point is sufficient to show manifest error as it can be seen at a glance that the letter was both incompetent and tended to prove no allegation contained in the indictment. It is the rankest kind of hearsay evidence. The mere fact that defendant's name is mentioned by the writer did not connect him with the matter therein stated. We feel that further discussion of this point is unnecessary, as the error contended for is apparent from a statement of the question.

7. U. S. Exhibit No. 33 as set forth in assignment of errors, ante p. 23, is the letter contained in the fourth count of the indictment. The witness testified that she received the letter thru the mail; that it was post-marked San Francisco. She kept the letter until she sent it to the U. S. attorney after which time she did not see it until it was offered in evidence (Tr. 175). The objection to this letter was made on the ground that the proper foundation had not been laid; that the witness could not state whether this is the letter she received from defendant, and that the same has not been identified as a letter received from defendant, and it has not been shown that defendant sent this particular letter or caused it to be sent or knew it was sent, nor that the signature was that of the defendant. In other words, no connection was made in any manner or form connecting the defendant with this letter. All that was shown was merely that the letter was received by the witness through the mail. It is imperative that some evidence connecting defendant with this letter should have been introduced before it was admitted in evidence in the absence of which there is only one conclusion and that is that the court erred in its ruling upon the admission of this letter.

SIXTH POINT.

The court erred in denying defendant's motion to direct a verdict of acquittal as per assignment of error 59, ante p. 25. ¹¹⁷⁷ In the case of *Stokes v. U. S.*, 157 U. S. 188, 39 L. Ed. 68, the court said:

“Three matters of fact must be charged in the indictment and established by the evidence (1) That the persons charged must have devised a scheme or artifice to defraud; (2) that they

must have intended to effect this scheme by opening or intending to open correspondence with some other person through the establishment or by inciting such other person to open communication with them; (3) and that carrying out such scheme such persons have either deposited a letter or packet in the post-office or taken or received one therefrom."

Assuming for the purpose of this argument that the indictment states sufficient facts to constitute a scheme to defraud, was such scheme established by the evidence? There is not one scintilla of evidence in the record to show that defendant ever at any time, or at all, misrepresented a past or present fact or gave a glittering promise for the future. Consequently there was no evidence that he formed a scheme or artifice to defraud.

"Fraud consists of some deceitful practice or wilful device calculated to mislead or deceive a person of ordinary intelligence and incite him to do something that he would not have done had he known the true facts." Black's Law Dictionary, p. 517.

Therefore, unless it be shown by the evidence in this case that the defendant misrepresented past, or present facts or future promises which would mislead an ordinary person, his conviction was not justified.

The indictment begins by alleging that defendant was a human being who pretended that he had attained the supernatural state of self-immortality in the body by a course of righteous conduct consisting of abstaining from eating meats, telling falsehoods, bearing false witness, and committing adultery. Ante p. 2. In the first place there is no evidence to show that defendant pretended to have such pow-

ers and in the second place, there is no evidence to show that he pretended to have attained such supernatural state by a course of righteous conduct consisting of abstinence of the sins enumerated. The bill of exceptions contained all of the evidence in this case and we dare say that the prosecution will not be able to point out any evidence sustaining the above proposition or in fact any evidence establishing the scheme as alleged in the indictment.

The indictment then alleges that such supernatural powers had enabled him to conquer disease, death, poverty and misery. Ante p. 2. What supernatural powers had enabled him to do this? It is not even alleged that he had any supernatural powers and we are unable to see how he could transmit these powers to others unless it be alleged in the first instance that he had such powers. Assuming that defendant claimed he had attained immortality by a course of righteous conduct, this would be a fact from which we could not infer that he had supernatural powers that could be transmitted to others, further, there was no evidence that defendant pretended to have supernatural powers and no evidence that he claimed that he could transmit such power to others.

There was no evidence that defendant pretended that he was of divine origin and birth, a son of the Holy Ghost, greater in authority, majesty and power than was Moses, Elijah, and John the Baptist, yea, that the mantle of the "Man of Galilee" had fallen upon him and he had received the keys to the kingdom of heaven. Ante p. 2. While there is no evidence in the record showing that defendant ever made such claims we are at a loss to understand how or by whom the prosecution intended to prove that such

claims were false, had they been proven as alleged. *American School v. McAnnulty* 187 U. S. 94. 47 Law ed 90.

It is possibly true that there is evidence to show that defendant was an impostor and an heretic in that he professed and embraced a religion which is contrary to the established faith of prevailing religion, to-wit: the Roman Catholic religion, Episcopal, Presbyterian, Baptist and other churches. Ante p. 28. And this is the under-lying reason for the conviction in this case. Is this a scheme to defraud? If it is, then every man who believes in a religion contrary to that of his neighbor is guilty of forming a scheme to defraud. We fully considered this question in our discussion on the motion to quash (Ante p. 24) and further discussion seems to be unnecessary here. There seems to be no authority in the law decisions bearing upon this point so it was necessary for us to seek elsewhere for some authority to support our contention and we quote from a letter written by Thomas Jefferson to M. Dufief, April 19, 1814. See "Liberty and the Great Libertarians" by Charles T. Sprading, page 82. Also "Life and Works of Thomas Jefferson."

"I am really mortified to be told that, in the United States of America, a fact like this can become a subject of inquiry, and criminal inquiry too, as an offence against religion; that the question about the sale of a book can be carried before the civil magistrate.

"Is a priest to be our inquisitor, or shall a layman, simple as ourselves, set up his reason as the rule for what we are to read, and what we must believe? It is an insult to our citizens to question whether they are rational beings or not, and blasphemy against religion to suppose

it cannot stand the test of truth and reason. If M. de Becourt's book be false in its facts, disprove them; if false in its reasoning, refute it. But, for God's sake, let us freely hear both sides, if we choose. I have been just reading the new constitution of Spain. One of its fundamental bases is expressed in these words: "The Roman Catholic religion, the only true one, is, and always shall be, that of the Spanish nation. The government protects it by wise and just laws, and prohibits the exercise of any other whatever." Now I wish this presented to those who question what you may sell, or we may buy, with a request to strike out the words, "Roman Catholic," and to insert the denomination of their own religion. This would ascertain the code of dogmas which each wishes should domineer over the opinions of all others, and be taken, like the Spanish religion, under the "protection of wise and just laws." It would show to what they wish to reduce the liberty for which one generation has sacrificed life and happiness. It would present our boasted freedom of religion as a thing of theory only, and not of practice, as what would be a poor exchange for the theoretic thralldom, but practical freedom of Europe. But it is impossible that the laws of Pennsylvania, which set us the first example of the wholesome and happy effects of religious freedom, can permit the inquisitorial functions to be proposed to their courts. Under them you are surely safe."

Following the allegation that defendant is an impostor and heretic, it is alleged that he was a seeker of vain-glory, a coveter of his neighbor's wife and his neighbor's goods and was alleged to habitually indulge in each and every practice he pretended to condemn to-wit: eating the flesh of animals, drinking intoxicating liquors, telling falsehoods, bearing false witness and committing adultery. Ante p. 3.

There is no evidence to show that defendant sought any vain-glory nor any glory at all and no evidence showing that defendant coveted his neighbor's wife and his neighbor's goods, and while it was not shown that defendant claimed to be a total abstainer from eating meat, there was no evidence to show that he was an habitual indulger in it. The testimony was that defendant ate meat in New York in 1910. (Tr. 149) and in San Francisco in 1915 (Tr. 128); that he used the word "damn" (Tr. 137) and "hell" (Tr. 165). Certainly this testimony does not show that defendant was an habitual indulger in all of the sins he was alleged to have pretended to condemn nor does it show that he was an habitual indulger in any of them.

The indictment then alleges that defendant pretended to be the author of 100 books treating of said supernatural powers. Ante p. 3. There is no evidence that he pretended to be the author of any books treating of supernatural powers. There was evidence, however, that he claimed to be the author of 100 books and this is a fact; it was shown that he did make such claim, but there was absolutely no evidence to show that this claim was false.

It is alleged that defendant was the author of one book but such book consisted of a small compilation of platitudes and garbled extracts from other works. Ante p. 3. There is no evidence to show that this book consists of extracts from other works. No other books were offered in evidence for the purpose of showing that this book was not entirely written by defendant.

It is then alleged that defendant organized in various cities of the United States, companies, associa-

tions and corporations with the ostensible object of publishing and selling said 100 books, printing and publishing a magazine, educating and instructing eligible persons and conferring upon them such supernatural powers above described and set forth; that he would claim that said 100 books and said magazine were being published so that the alleged "victims" would invest money in the stock and capital of said corporations which money defendant intended to appropriate to his own use. Ante p. 4. The indictment goes on to negative these allegations and concludes the paragraph by alleging that when the alleged false pretenses became known, defendants, would remove to other cities and make the same claim using assumed and fictitious names for such purpose. Ante p. 4. The evidence shows that defendant organized a corporation in New York in 1910 for the purpose of carrying on his work and that during the years 1913-14-15 he, or those identified with THE NEWTHOT movement, organized THE NEWTHOT PUBLISHERS, THE NEWTHOT UNIVERSITY, THE NEWTHOT CHURCH, and THE NEWTHOT ORDER (U. S. Exhibit 10.). These corporations were organized under and by virtue of the laws where they were formed and the purposes for which they were organized are stated in the articles. U. S. Exhibit 10. These corporations were perfectly legal and complied in every respect with the law of the place where they were organized. Consequently it cannot be contended that they were fraudulent in themselves. There was no misrepresentation of these corporations and there was no evidence to show that defendant claimed that all 100 books and the magazine were being published so therefore the charge that they

made these claims so that the alleged "victims" would invest money in the stock of the corporations and subscriptions of said magazine with the intention of appropriating the money to their own use falls to the ground as no false representations were made by defendant to any person or persons whatsoever. Further, there is no evidence to show that defendant intended to remove to other cities when his alleged fraudulent acts became known as there was no fraudulent acts shown no representation made that would deceive even a child. The same can be said of the allegations that defendant used assumed and fictitious names. Defendant used the names of JOHN FAIR NEW, J. F. NEW, and NEWO NEWI NEW, J. F. NEW being the abbreviation of JOHN FAIR NEW, the name given by his mother and N. N. NEW being the abbreviation of NEWO NEWI NEW, the name given by his father. Of course defendant's name was at one time J. F. NEW, Jr. Defendant also had a cousin by the name of J. F. NEW, Jr. (Tr. 111) who was interested in the NEWTHOT movement. No person was ever deceived by any of these names nor were any misrepresentations made to any person or persons concerning these names. In fact, according to the testimony of all the witnesses, they fully understood the origin of these names. They were not assumed or fictitious but on the other hand, names that the defendant had a legal right to use so long as he did not deceive any person by such use. This is the right that every citizen has, but of course, if a person abuses the use of the name or deceives people into doing things they would not have done had they known the true circumstances, they are responsible to the law for their actions.

There is no evidence to show that defendant misrepresented one single thing concerning his name.

The indictment goes on to allege that defendant would advertise that he had organized according to law and was conducting an educational university for the purpose of treating said art and powers of supernatural healing and teaching. Ante p. 4. It is true that defendant claimed to have organized such university and the evidence shows that he did, but the indictment does not allege that defendant claimed to have any powers of supernatural healing or teaching. Consequently, even if there was evidence that these powers were claimed by defendant such evidence is not predicated on any allegation contained in the indictment. There was no evidence that the university was not what it was represented to be.

It is a fact that defendant claimed that seventy free scholarships had been endowed by a wealthy man and that those possessing these scholarships would pay only ten dollars for enrollment and five dollars for graduation and that the regular price of these scholarships was one hundred dollars. Ante p. 5. There was absolutely no evidence to show that these facts were false nor that defendant ever enrolled more than seventy free scholarships under this endowment, nor was there any evidence to show that no efficacy or power was lodged in said university and no evidence to show that the parties possessing these scholarships did not get exactly what they contracted for. In fact, they were all perfectly satisfied with the course, even the hostile witnesses. They all received exactly what they were told they would receive. They were not misled or deceived as to any past or present fact or future promise.

Finally, it is alleged that defendant made a false application of section 602-602A of the Civil Code of California. Ante p. 5. We did not deem it necessary to set forth the facts wherein it is alleged that the false application of these sections were made for the reason that the sections of the code were not introduced in evidence nor was there any evidence that defendant filed with the county clerk an affidavit as required by said sections of the code. Even if we should concede that such an affidavit was filed by defendant, which we do not, there is no evidence to show that the facts alleged in this paragraph are not absolutely true. There is no evidence to show that defendant had not been regularly elected to the office of Head Bishop nor is there any evidence to show that the church that defendant claimed to be head of had no existence, nor was there any evidence to show that THE NEWTHOT CONGRESS had not been called and held.

U. S. Exhibits Nos. 22, 23, 33 are the letter contained in the second, third and fourth counts of the indictment upon which defendant was convicted. Ante p. 18. The only evidence offered to show defendant's connection with these letters was merely that the witnesses received them through the mail (Tr. 159-176). The court granted the motion to direct a verdict of acquittal as to the first, fifth, sixth and seventh counts of the indictment (Tr. 177) and we urge that the motion should have been granted as to all of the counts for the reason that there was no evidence to show that defendant had anything to do with depositing in the mail the letters contained in counts two, three and four of the indictment. This evidence is indispensable to a conviction under the

ruling of the court in the case of *Stokes v. U. S.* 157 U. S. 188, 39 L. Ed. 668.

It can therefore be readily seen that there is no evidence in the record establishing the alleged scheme to defraud, nor that defendant deposited in the mails the letters contained in the indictment. The bill of exceptions contains all of the evidence introduced on the trial (Tr. 241) and we respectfully request the district attorney to point out the evidence which he contends sustains the allegations of the indictment. We are frank to say that we cannot find any such evidence in the record and sincerely believe that none exists. When we consider the utter lack of evidence to support the indictment it is no wonder that the jury included in their verdict a recommendation of defendant to the clemency of the court and found the other defendant not guilty. (Tr. 80)

We therefore submit that substantial justice has not been given defendant and the judgment should be reversed.

Dated May 10th, 1917.

Respectfully submitted,

REISNER & HONEY,

Attorneys for Plaintiff-in-error.

.....,

No. 2948

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN FAIR NEW, alias J. F.
NEW, alias J. F. NEW, JR., alias
DR. NEWO NEWI NEW,
Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon Appeal from the Southern Division of the United States
District Court for the Northern District of California,
First Division.

JOHN W. PRESTON,
United States Attorney.

CASPER A. ORNBAUN, **F. D. Monckton,**
Asst. United States Attorney, **Clerk.**
Attorneys for Defendant in Error.

Filed this.....day of May, 1917.

FRANK D. MONCKTON, Clerk,

By....., Deputy Clerk.

No. 2948.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN FAIR NEW, alias J. F.
NEW, alias J. F. NEW, JR., alias
DR. NEWO NEWI NEW,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

As stated by counsel in his opening brief, this case comes before this Court on a writ of error granted September 29, 1916. The plaintiff in error, John Fair New, alias J. F. New, alias J. F. New, Jr., alias Dr. Newo Newi New, and one Marie T. Leo, alias Marie Tully, alias Marie Graham, were charged with having devised a scheme and artifice to defraud various persons by and through the Post Office establishment of the United States.

The indictment consists of seven counts; the same scheme, however, is charged in each count and the only difference that exists in the counts set forth in the indictment is that seven different letters were sent through the mail. Upon the trial of the case, the Government failed to call the parties to whom the letters were sent in counts one, five, six and seven, and the Court instructed the jury to return a verdict of not guilty on these counts, and the jury by their verdict found the plaintiff in error guilty on counts two, three and four, covering the letters which the Government established were sent through the mail. No effort was made on the part of the Government to have the seven counts included, inasmuch as the parties to whom the letters were sent resided at such a distance that the Government felt it impracticable to call the witnesses.

Marie T. Graham, having been acquitted by the jury, we are now only concerned with the plaintiff in error, John Fair New, in these proceedings.

The scheme to defraud, briefly speaking, is as follows:

That said plaintiff in error, John Fair New, claimed to be a human-being who had attained a supernatural state of self-immortality in body by a course of righteous conduct, consisting of an abstinence from the use of meats as food, abstinence from the use of intoxicating liquors of any kind, abstinence from the use of indecent or profane lan-

guage of any kind, abstinence from telling falsehoods and bearing false witness against his neighbors, and abstinence from the sin of committing adultery, etc.

That because of the supernatural powers which the plaintiff in error, John Fair New, possessed, he was enabled to conquer disease, death, poverty and misery, and that this power could be transmitted to those who were willing to accept his teachings and pay therefor the sums demanded.

That the foregoing pretensions were untrue and were known by the plaintiff in error to be untrue, and that plaintiff in error did not practice the dictates advocated by him.

That in order to obtain money and other things of value, the plaintiff in error, John Fair New, would pretend that he was the author of a large number of books, to wit: one hundred, treating on supernatural powers, when in truth and in fact he was the author of only one book which consisted of a compilation of platitudes and garbled extracts from other work.

That the plaintiff in error would organize in various cities of the United States companies, associations and corporations of various kinds with the ostensible object of publishing said books, but that the real object of the said plaintiff in error in organizing said corporations was merely for the purpose of selling stock in said corporations and receiving money and converting it to his own use.

ARGUMENT.

Counsel for plaintiff in error, in his opening brief, sets forth various specifications of errors, beginning on page 8 of said brief, and then endeavors to cover said assignments in the argument which follows. Counsel, on page 25 of his brief, and for the first point presented therein, states that the motion to quash the indictment should have been granted because the indictment is a direct attempt to prohibit the plaintiff in error from a free exercise of his religious beliefs and is also an attack upon the teachings of the religious establishments to which the plaintiff in error belongs.

In reply to this contention, the Government desires to place itself on record now, that there was nothing in the proceedings in this case that justifies counsel for plaintiff in error in making the assertion that this is an attack upon the religious beliefs of plaintiff in error. The plaintiff in error is charged with having used the mails for the purpose of defrauding innocent people. The indictment sets forth very clearly the fact that the plaintiff in error was not sincere in the religion or in the doctrines which he pretended to preach and this is the gist of the whole case.

It is a well established principle that anyone who is not sincere in the doctrines which he preaches may be prosecuted for using the mails to defraud when the mails are so used for the purpose of carrying out any scheme formulated by him.

In the case of *United States vs. White*, 150 Fed. 379, the Court there instructed as follows:

“If you find that, at the time when he made the alleged pretensions and mailed the letter, he knew that he could not and would not enable the persons, who paid him money in order to acquire such occult and supernatural powers, to acquire them, you will have little difficulty in finding that his purpose in making such false pretense was the fraudulent one of defrauding each of such persons.”

It was again stated in the case of *Post vs. United States*, 135 Fed. 1, as follows:

“If she practiced in good faith without the intention to defraud, she is not guilty, although in fact the theory and practice followed were worthless; but if, without belief in her practice and with knowledge that her representations regarding it were false, she made them to defraud, the fact that mental healing is a lawful vocation does not prevent conviction.”

The doctrine set forth in the above cases is the well established principle which governs a case similar to the one now under consideration. If John Fair New was sincere in promulgating his doctrines, then there would be merit in the contention of his counsel, but on the other hand, if the Government established the fact to the satisfaction of the jury that the said John Fair New was not sincere in the doctrines which he advocated, and furthermore, was carrying on his work for the purpose of de-

frauding innocent people, then in this event, the principle of the two cases set forth should apply. It is with the object in view of establishing the fact that the plaintiff in error, John Fair New, was conducting his work for fraudulent purposes that the Government will now briefly review some of the evidence introduced in the case.

The plaintiff in error first began his operations in Boston or New York City and we find him selling and trying to sell a book entitled the "New Life Theology, the New Life Science". This book is marked exhibit "11" and a review of the testimony (p. 126 trans.) in the case will show that this book was published by the father of plaintiff in error, although said plaintiff in error, in an effort to deceive the public, removed one of the pages in the front part of it and inserted his picture therein. It is the contention of the Government that this alone is sufficient evidence to show a fraudulent design on the part of the plaintiff in error.

Then we find the plaintiff in error organizing a corporation in the State of New York for the purpose of publishing some forty-nine or fifty books which he claimed to be the author of.

The evidence introduced in the case by the Government's witnesses, C. A. Leach (pp. 147 trans.), Mrs. Ida B. Stetson (pp. 162, etc., trans.), and Florence K. White (pp. 131, 132 trans.), shows conclusively that the plaintiff in error secured sev-

eral hundred dollars from each of these persons and that no results were ever obtained by said plaintiff in error in the organization of the New York corporation known as the New Life Publishing Company.

The evidence further shows that the plaintiff in error, for the purpose of inducing Mrs. Florence K. White to invest her money in said corporation, promised to start her out in church work on a salary of \$35.00 per week (p. 132 trans.) but absolutely failed to do this. He also told Mrs. White, as a further inducement to get her to invest in said corporation, that Mrs. Ida B. Stetson had invested \$1500 in said corporation and that Mr. C. A. Leach had also invested the same amount. The testimony of Mr. Leach, Mrs. White and Mrs. Stetson also shows that the plaintiff in error had secured from a Mrs. Johnson, about seventy years of age, a manuscript for a work called "The New Dawn" and that it was only after considerable opposition on the part of Mr. Leach (p. 148 trans.) that the plaintiff in error did not make use of said manuscript and claimed it as his own work.

The evidence introduced on behalf of the Government and covered by the testimony of Mr. Leach, Mrs. Stetson and Mrs. White also shows that as soon as plaintiff in error had secured from them all of the money that he could get them to pay into the corporation, he requested them to resign, stating that he had other parties who would finance the

corporation; that because of his insistence, these parties did resign and soon thereafter plaintiff in error left the City of New York and came to Seattle and then to Los Angeles (p. 126 trans.) and there organized corporations for the purpose of publishing the same books that the New Life Publishing Company of New York was organized for. After operating for some period in Los Angeles, and after securing considerable money there (pp. 213, 215 trans.) the plaintiff in error came to San Francisco and again undertook to organize four corporations, one of which was for the same purpose that the New York corporation and the Los Angeles corporation was organized for, namely: to publish the books which plaintiff in error claimed to be the author of. It will also be noted from the literature of plaintiff in error introduced in this case, that one reading such literature would be induced into believing that the said books had already been published (pp. 57 and 71 Ex. 7), when in truth and in fact, said book had not been published by the said plaintiff in error, except perhaps one or two.

In San Francisco plaintiff in error organized four corporations, with the following names: The Newthot Publishers, The Newthot University, The Newthot Church and the New Order (Ex. 10) and again proceeded to sell stock the same as he had done in Los Angeles and New York.

One of the greatest frauds perpetrated by plain-

tiff in error was with one rather elderly lady known as Julia Etta Marston. She was called from the East by the Government. Her testimony shows that before she left the East she sent a telegram to plaintiff in error requesting him to meet her at the train. She was met at the train by plaintiff in error and they both stopped at the same hotel. She states in her direct examination as follows:

“I bought \$10,000 worth of stock in the corporation and paid it in cash but I borrowed \$5500 dollars of Dr. New to pay the \$10,000.
 * * * I put \$4500 in cash in the corporation and then I borrowed \$5500 from Dr. New.
 * * * I invested in the Newthot Book Publishing Company. * * * After I came to San Francisco I paid for the incorporation papers; I think it was \$100. I paid that out of my own personal funds. I paid the \$100 and the incidental expenses. * * * I transferred two lots of mine to Dr. New—deeded them.”

And in this connection, in order to show the character or type of women with whom plaintiff in error was dealing, and for the further purpose of showing this Court that the plaintiff in error had much power over his victims, the Government wishes to call attention to a portion of Mrs. Marston's testimony with reference to taking lectures from plaintiff in error. The testimony is as follows:

“I paid him \$10 when I sent the application and when I completed I got my diploma and

gave him \$100. When he came to give me personal lessons; the lessons consisted of asking me bible questions and I would answer them and I also had to lecture before him. When I was lecturing he simply sat and listened. Once when I was lecturing, I remember that he went to sleep. He said, 'Sister, does it matter if I close my eyes, I can hear you.' And I said 'No'. After a while he was shaking his shoulders and laughing after I got through, and I said 'What is the matter?' and he says, 'Well, it's too good to keep. I slept fifteen minutes and waked up and you were going on just the same.' As to my being prepared to take up the advanced work he said that I was the best qualified and one of the best bible students he had ever met. After that he did not prescribe any work for me."

It can readily be seen from the above tetsimony that the action on the part of plaintiff in error was merely for the purpose of entrapping his victims and the statements made by her, and her attitude, indicate conclusively that she readily yielded to his solicitations and was willing to invest her money in a worthless concern.

So we find the plaintiff in error organizing a corporation in New York, Seattle, Los Angeles, and in San Francisco for the purpose of publishing the same books which said plaintiff in error claims to be the author of, and in this connection the Government desires to state that a review of the testimony will show that said plaintiff in error would

abandon the corporations organized by him shortly after the first sales of stock were made.

It was in San Francisco that the plaintiff in error evidently desired to perfect his fraudulent scheme on a larger basis than was ever attempted by him before, as he organized four different corporations here during the Fair time and, although the said plaintiff in error is now before this Court with his appeal on forma pauperis proceedings, paragraph 6 of the Articles of Incorporation in the Newthot Publishers would indicate that he was investing in money or property the sum of \$990,000. Said paragraph reads as follows:

“The names of those who have subscribed money or property to assist in founding the Newthot University, together with the amount of money and description of property subscribed, as follows, namely, to wit:

Dr. Newi Newo New, Publisher Newthot Church.....\$990,000

Dr. M. L. Claire, Pastor Newthot Church 10,000.”

As a matter of fact, plaintiff in error invested no money in this corporation and the Court can readily see what fraud might be perpetrated upon the people if \$990,000 worth of stock were issued to him so that he may then be in a position to sell his stock as he had done theretofore in the other corporations.

In this connection the Government desires to call attention to a letter written by the plaintiff in error to Dr. Claire, who was operating with plaintiff in error at the time that said letter was written:

“Hollenbeck Hotel,

Los Angeles, Cal., Friday, P. M.

Dear Dr. Claire:

Your welcome letter recd. Am very glad to hear from you. Now sister if any one calls, man or woman, to ask about the book Company, Church or the University, be sure and always have and tell a *prosperous financial* business story as I have referred some parties there or rather gave them the street and number and said their friends (who live there) could call there at our offices and see the progress for themselves. I am writing to Marie the same. I gave her name as V.Pres. and yours as Sec. and local Pastor, so be ready both of you at all times to tell the *fine condition* of the business generally. This is *very* important so talk it over with Marie and be ready. Always easy and never embarrassed in the least and always most prosperous.

(over)

Also we are to have the New Auditorium for the Newthot World Congress etc. I will tell Marie to see you and talk it over so as to be ready. Read her this letter and remember your offices, etc. May God bless you both and help and keep you. Bye and Bye. N.

Also many students all over the world, etc. etc. etc. etc. It is the Newthot Co.'s doing business

now there. See. Large sales of books, etc. etc. etc.”

This letter alone conclusively shows the disposition on the part of the plaintiff in error to misrepresent the conditions of his organizations for the purpose of selling stock.

It is also interesting to note that although plaintiff in error pretended that the eating of meat was against the principles which he advocated, yet whenever the opportunity properly presented itself, he never refused to eat meat himself. Both Florence K. White and C. A. Leach (pp. 128 and 134, trans.) testified that plaintiff in error ate meat whenever he was fortunate enough to have it set before him on the table. Florence K. White, when asked whether or not plaintiff in error ate meat, testified as follows:

“Every time Dr. New was at the table with me he ate meat. We had meat every day twice a day. As to eating meat he said ‘We preach that we do not eat meat to the outside world but we can have what we like at our own private table.’ ”

This is another instance where plaintiff in error tried to deceive the outside world and goes to show conclusively that he was insincere in the doctrines which he advocated.

It is also a well established fact, as drawn out by the testimony by plaintiff in error and defend-

ant, Marie Tully Graham, that they were occupying apartments together. It is true that they claimed that defendant Graham slept on a couch in the kitchen but the testimony of Walter F. Crowley, G. Bohn, J. W. Jessen and C. A. Conlan would indicate otherwise. For instance, Mr. Crowley stated as follows:

“I was out at the apartment of Dr. New the morning that he was arrested about half past six o’clock in the morning on October first of last year. Mr. Jessen, Mr. Bohn and Mr. Conlan, Deputy United States Marshals, were there. I saw an entrance effected in the apartment. Mr. Bohn knocked on the door and he knocked several times. A lady’s voice answered and he asked if Dr. New was in there and the woman replied ‘no’. Then he said ‘You will have to let me in.’ She said, ‘You can’t come in here’. Mr. Bohn said, ‘You had better open the door because we are coming through anyway.’ So, in the course of a few minutes the lady opened the door. I saw Dr. New in there. He was in bed in the front room known as a wall bed. He had some of his street clothes on. He was in his underwear. The bed was directly in front of the door. It was mussed up. I cannot say as to whether it was occupied by more than one person. Mrs. Graham had on a kimona. I saw some ladies’ apparel in Dr. New’s room; some of it was on that window seat and part of it on the chair in front of the bed. I don’t know that I could describe the wearing apparel. The best way to describe them would be to say a lady’s

lingerie; that is, stockings, corsets and the rest. I was there in the capacity of a newspaper reporter. I was detailed by the City Editor to go there. There was false hair lying on the dresser. There is what is known as a switch lying on the dresser.”

The testimony of Mr. Jessen and Mr. Bohn was to the same effect.

The next point to which the Government desires to direct attention and which will show still more conclusively the fraud perpetrated by plaintiff in error, is with reference to his age, as testified to by Grace de Wolf, a witness called on behalf of the Government, who interviewed plaintiff in error in the capacity of a newspaper reporter, as follows:

“I interviewed Dr. New in the Civic Auditorium during the year 1915. Dr. Claire was present. Dr. Claire introduced me to Dr. New. Dr. New told me he was 80 years of age—either 80 or 82. He told me he was never going to die. He said he dressed in white because black was an indication of death. He said he could grow hair over night. When I asked him why he was bald himself, he said he was bald because he preferred it. He told me it was possible for him to become thin over night but that he was fat because he preferred to be. He said if he should go to Los Angeles he would get thin because the climate down there was warmer and he would not need so much flesh but then should he return to San Francisco he would immediately get fat again.”

Florence K. White testified that the plaintiff in error claimed to be "79 years young" to her and that he tried to get Mrs. Johnson, who was associated with The New Life Publication Company, the corporation organized in New York, to say that she was 150 years of age. Her testimony in this respect is as follows:

"He told Mrs. Johnson that she should say that she was 150. She was so well preserved. Her hair was very white; she had a very clear complexion. She was a woman about, I should judge, 70."

The reason for this, of course, can plainly be observed, inasmuch as plaintiff in error claimed to believe in the immortality of the body and in order to deceive those with whom he came in contact, it was his desire to have people believe that he was much older than he was and tried to get Mrs. Johnson to make a false representation concerning her age.

It is true that the indictment accuses plaintiff in error of not publishing the books which he pretended to be the author of. An examination of the literature sent through the mails would naturally lead one to believe that said plaintiff in error is the author of one hundred books. In fact, on page 4 of the only book in the Government's opinion that has been published by defendant known as "The Newthot Science", and marked "Exhibit 3" will be found the names of one hundred books. The

truth of the matter is that the Newthot Science is the only publication, to which the Government's attention has been called, published by plaintiff in error, and this, as set forth in the indictment, consists of a compilation of platitudes and garbled extracts from other works. In order to further deceive the people into believing that he had published more than one book, the Government calls attention to exhibits 1, 2 and 3. Exhibit 1, entitled "The Newthot Guide" is identical with exhibit 2, entitled "Newology" and "Newology" and "The Newthot Guide" consisting of exhibits 1, and 2, and composed of one hundred and forty-eight pages are copied word for word in the first one hundred and forty-eight pages of "The Newthot Science", so here again, it can readily and clearly be seen that plaintiff in error is trying to deceive the public into believing that he is the author of three books, when in fact he is the author of but one, and in this connection the Government desires to again call attention to page 7 of exhibit 3 "The Newthot Science", which reads as follows:

"ORIGINAL THINKER. — Twenty thousand years ago, possibly longer, during the Golden Age, before the Fall of man, when all men lived by the Newological Law of Correspondence and held direct communion with God, the Newologist sat in the solitude of the mountain, desert, forest and plain, in the profoundest abstraction, endeavoring to think out the Newological problem of human existence.

Aristotle, Berkeley, Comte, Hegel, Kant, Plato, Socrates and others, adown the centuries have been seeking a solution to the problem of immortality in the body. Akin to the ancient seers, isolating himself from the world, seeking silence and solitude, surcease from busy humanity, Newology has its studious sage, its wanderer thru the field of thot, its searcher for an endless life. And so our Great Newologist, quietly seated in mental abstraction so profound that for years he was unconscious of all physical environment, even oblivious to heat and cold, rain and storm, noise and confusion, sleep and exercise, hunger and thirst, until at last in the most glorious moment of his life, he discovered Newology by which he is now to redeem humanity from all the ills of the past."

It can be seen from this page again that the plaintiff in error is maliciously, and evidently for the purpose of carrying out the idea of deceiving the readers of this book into believing that he is immortal in body, misrepresenting a fact. He states that "quietly seated in mental abstraction so profound that for years he was unconscious of all physical environment, even oblivious to heat and cold, rain and storm, noise and confusion, sleep and exercise, hunger and thirst, until at last in the most glorious moment of his life, he discovered Newology by which he is now to redeem humanity from all the ills of the past." Can it be said that the plaintiff in error did not know that he was mis-

representing the facts in making a statement of this kind? Does this Court believe that he was unconscious of his surroundings for years, oblivious to heat and cold, rain and storm, noise and confusion, sleep and exercise, hunger and thirst? And yet in the face of this and the other facts to which your Honors' attention have been called, counsel in the closing paragraph of his brief states:

“It can therefore be readily seen that there is no evidence in the record establishing the alleged scheme to defraud”.

On page 10 of said exhibit 3, entitled “The New-thot Science”, the following paragraph appears:

“BLONDE HERCULES.—The author belongs to a class by himself. Physically he is a blonde Hercules, with square, massive shoulders, huge arms and legs, smooth-shaven face, almost boyish in general aspect. His eyes are a keen gray, overtopped with blonde silken eyebrows. His attire is usually a complete suit of white broadcloth, including frock coat and well-creased trousers. He greets you with a smile. He is opposed to everything that savors of death. He would revise every dictionary and cast from their pages every word symbolical of the ending of life. The words ancient, old, dead, dying, fading, sorrow and pain should never be spoken, and to the mouths of Newologists such utterances are tabooed. Talk of prolonging life. Think of living forever. Believe that you will exist perpetually. Get ready to live forever.”

Counsel attempts to make a point with reference to a failure on the part of the Government to properly identify the letters through the mail. It is a well recognized fact that if plaintiff in error devised a scheme and artifice to defraud, and for the purpose of carrying out said scheme, mailed a letter, it matters not how harmless the contents of the letter wrote, the crime of misusing the mails is completed.

U. S. vs. Young, 232 U. S. 155-161.

U. S. vs. Kenofsky, No. 649, April 9, 1917,
Supreme Ct. Dec.

An examination of the testimony of Henry Doolittle and Mrs. Stacy Spear, covering the second, third and fourth counts of said indictment will show that there is no merit in the contention of counsel. Their testimony reads as follows:

“HENRY H. DOOLITTLE, a witness called on behalf of the Government, having been duly sworn testified as follows:

MR. PRESTON—Q. I show you here what purports to be a letter addressed to Mr. Henry H. Doolittle, 511 South Olive Street, Los Angeles, Calif., dated July 8, 1915, signed ‘Faithfully thine in truth, love and peace N. N. New, Bishop, the New Thot Temple Inc. Palace of Education, P. P. I. E. San Francisco, Cal.’ and ask you if you received that letter?

A. Yes sir.

Q. Where did you get it?

A. It came through the mails from San Francisco.

Q. Was it enclosed in an envelope?

A. Yes.

Q. Postmarked?

A. Yes.

Q. It is postmarked San Francisco. Did you receive it soon after or on the date it bears date here?

A. Yes.

Q. What has become of the envelope?

A. I destroy generally the envelopes.

Q. Did you destroy this envelope?

A. Yes.

Q. And this paper was taken by you out of the post office at Los Angeles?

A. The letter you mean?

Q. Was it delivered by the post office?

A. Yes.

Q. At Los Angeles?

A. Yes.

Q. You are positive about its having been mailed at San Francisco?

A. Yes.

MR. PRESTON: We offer it in evidence.

MR. HONEY: We would like to cross-examine the witness—ask him just a few questions as to the letter.

Q. Has this letter been in your possession ever since you received it?

A. No.

Q. It is dated July 8th, 1915: can you tell us about when you received it?

A. A few days I think after it was mailed?

Q. Within the next two or three days?

A. Yes.

Q. Now then, how long did it remain in your possession?

A. Until last year when it was asked to be sent here.

Q. Somebody asked you to send it here?

A. Yes.

Q. Then you forwarded it to San Francisco, did you?

A. Yes.

Q. You don't know as a matter of fact that this is the same identical letter you received through the mail, do you?

A. It seems to me that it is.

Q. You received one something like this?

A. I think that is the original letter that I sent on here.

Q. The point I make is you don't know as a matter of fact that this is the identical letter, do you?

A. I have no reason to doubt it is.

THE COURT: You mean by that that it has not been in his possession ever since?

MR. HONEY: The point I am asking is that there might have been 50 letters exactly like this; the witness can only say he received a letter similar to that.

THE COURT: He can say he received a letter, which he thinks is that letter, and he sent it to the postoffice department.

MR. HONEY: But you don't know as a matter of fact that this is the same letter that you took out of the postoffice in Los Angeles?

A. You mean, that I would recognize some particular mark on it?

Q. Yes.

A. I did not particularly mark the letter, but I sent them on, as I asked them to be sent, I had no reason to think that they changed the letter or anything of that kind.

Q. We do not either, Mr. Doolittle, but the point is, you don't absolutely know that that is the same letter that you took out of the post office at Los Angeles?

A. I don't know of any reason why it is not the real letter.

MR. PRESTON: We think it is sufficiently identified and we offer it.

MR. HONEY: We will save an exception. No. 1. (The letter is marked "U. S. Exhibit 22")

MR. PRESTON: Q. I show you here another signed letter 'N. N. New, President', addressed to the same person, 'Mr. Henry H. Doolittle, 511 South Olive Street, Los Angeles, Calif.' under date of July 22, 1915, and ask you whether or not that is a letter that you received through the mails?

A. Yes, that is another letter which I received through the mail.

Q. Was it likewise postmarked as the other one, 'San Francisco, Calif.'?

A. Yes sir.

Q. What has become of the envelope?

A. The envelope probably was destroyed as was the other.

THE COURT: I understand his testimony concerning this letter will be the same, on cross-examination as it was in regard to the other, and that you object to the introduction as nothing identified, the objection is overruled and an exception noted. Exception No. 2.

MR. HONEY: Yes, it is understood that our objection goes to that. (The letter is marked 'U. S. Exhibit 23').

MR. PRESTON: I show you a letter signed 'J. F. New, Secretary' and ask you whether or not you received that letter or a similar one through the mail?

A. Yes, this is another of the letters that came along.

Q. Did you get that through the mail the same as you did the others?

A. Yes.

MR. HONEY: Those two letters which you have already read are the letters which are mentioned in the indictment?

MR. PRESTON: Yes.

MR. HONEY: We object to this one on the ground that it has not been shown that the defendant sent that letter, or either of them. We submit that it purports to come from J. F. New, Jr.

THE COURT: The objection will be overruled.

MR. HONEY: Exception—No. 21½. (The document is marked 'U. S. Exhibit 24')."

Mrs. A. B. STACY SPEAR, a witness called on behalf of the government, having been duly sworn, testified as follows:

"MR. PRESTON: Q. Mrs. Spear, you reside in Los Angeles?

A. I did at the time that I received that letter. I am residing at Watts.

Q. That is near Los Angeles, is it?

A. It is between Los Angeles and Long Beach.

Q. I show you here a paper purporting to be a letter addressed to you and ask you whether or not you ever saw that before?

A. Yes, sir, I received it when I was at that address.

Q. How did you receive it?

A. Through the mail.

Q. State whether or not it was post marked on the envelope?

A. Postmarked San Francisco.

Q. Was it in an envelope?

A. Yes sir.

Q. Stamped?

A. Yes sir.

Q. What did the envelope bear?

A. I could not say now. It was so long ago, you see.

Q. How did it compare with this date at or about the date mentioned in this letter or near the date?

A. Yes sir, but I could not say for sure about the date, you see, because I did not observe.

Q. You are positive however that it was in a stamped envelope and post marked San Francisco and addressed to you at this address?

A. Yes sir.

Q. And you received it through the mail?

A. Yes sir.

MR. PRESTON: We offer it in evidence, if the Court please."

Counsel representing plaintiff in error objected to the introduction of said letter in evidence, which objection was overruled by the Court.

It should be noted that plaintiff in error although he took the stand in his own behalf, never denied sending or causing to be sent the matters referred to herein, through the mail.

In answer to counsel's second point set forth in his brief, namely: that the indictment consisted entirely of general allegations and conclusions of law which were so uncertain, ambiguous and unintelligible that it was impossible to prepare a defense, the Government calls attention to the indictment which will show clearly and conclusively that the scheme set forth in the first count is not ambiguous or uncertain or in any way confusing and that this scheme is incorporated into each of the other six counts.

There is an allegation on page 32 of counsel's brief to the effect that the indictment does not allege that plaintiff in error claimed to have had any supernatural powers but it is clearly alleged in the indictment "that said defendants would *pretend* that defendant John Fair, alias J. F. New, alias J. F. New, Jr., alias Dr. Newo Newi New *was a human-being who had attained the supernatural state of self-immortality* in the body by a righteous conduct consisting of * * * etc." It can readily be seen from this allegation that it is positively urged in said indictment that plaintiff in

error did claim to possess a supernatural state, and the word "power" is used synonymously with the word "state" elsewhere in the indictment.

The fourth point raised by counsel in his brief, namely: that the Court erred in denying defendant's motion to dismiss the indictment interposed on the ground that he had not been given a speedy trial within the meaning of the sixth Amendment to the Constitution of the United States, can be answered by a reference to the proceedings which took place in this case preceding the trial, and in this connection the Government desires to set forth the counter-affidavit interposed by Mr. M. A. Thomas, as follows:

"M. A. THOMAS, being first duly sworn, deposes and says that he is and at all times mentioned herein was an Assistant United States Attorney for the Northern District of California, and that he has since about the 5th day of March 1916 had charge of the prosecution of the above entitled cause; that said cause was set down to be tried on the 14th day of February, 1916, and was by consent of all parties, continued from February 14, 1916, to March 20, 1916; that on the 15th day of March 1916 the United States moved for a continuance of the said cause for trial for the term, which said motion was presented on March 15, 1916, on affidavits and was granted by the Court on March 20, 1916, on which date the District Court ordered the case continued to April 3, 1916, to be reset; that about ten days prior to

the 14th day of March 1916, affiant told John C. Catlin, who was then attorney for the defendants, that it would be impossible for the Government to proceed with the case on trial on March 20, 1916 or at any time near thereto, on account of the fact that United States Attorney, John W. Preston, who had had sole charge of the case prior to that time, was ill, that no one else in the office of the United States Attorney had sufficient knowledge of the case, or could gain sufficient knowledge of the case on account of the fact that the case was quite complicated and on account of the fact that the other assistants in the office were occupied with other cases of equal importance, which could not be postponed; that said John C. Catlin told affiant that he would consult with his clients and see whether or not they would consent to a continuance and that he did not notify affiant of their refusal to consent until about the 14th day of March, 1916; that the case was continued to be set to April 12, 1916, on which date it was, on motion of the United States Attorney, continued to the July term to be set; that on April 12, 1916, the calendar of the District Court was full and the Court announced in continuing the said cause to the July term to be set; that there was no date during the present term upon which the Court could set the case down for trial on account of the fact that other cases which had previously been set had the right of way.

Affiant further states that on March 25, 1916, John C. Catlin, Esq., who was then attorney for the defendants herein, advised affiant that

he intended to make an application to the Circuit Court of Appeals for a Writ of Habeas Corpus on behalf of the defendants herein and that he did, on said date, make an application for the said writ; that he, on said date, advised affiant that the Circuit Court of Appeals did not grant a Writ of Habeas Corpus and that the said John C. Catlin desired to know if the Government would consent to a reduction of the bonds of the said defendants, and that the said John C. Catlin stated to affiant that if a reduction of bonds could be had, the defendants would be able to secure certain moneys for their subsistence and that he would abandon his application for a Writ of Habeas Corpus. Affiant thereupon consented to and moved the Court for a reduction of bond of the two defendants and their bonds were reduced on said day to \$500 on the part of defendant Fair, and \$100 on behalf of defendant Graham; affiant further states that the condition of the calendar in the said District Court would not on April 26, 1916 and will not now permit the setting of this case for trial at any time during the present term."

As a matter of fact, the Government was always anxious and desirous of an early trial in this case. An examination of the pleadings on file will show that plaintiff in error, by interposing numerous dilatory pleas, was instrumental in prolonging the trial during the first few months after the indictment was returned. Then came the illness of Mr. Preston who had been in full charge of the case and who was the only attorney who was familiar

with the Government's case and in a position to handle said case for the Government. As soon as the seriousness of Mr. Preston's illness was discovered an effort was made on the part of the United States Attorney's office to familiarize itself with the proceedings and proceed to trial and Mr. Preston upon his return from his sick bed gave precedence to the trial of this case.

In reply to the fifth point raised by counsel on page 41 of his brief, the Government desires to call attention to the fact that each and every of the exhibits referred to herein were either letters or advertising matter used by plaintiff in error in the conduct of his fraudulent scheme and under the circumstance of this case the Government was clearly entitled to introduce the same.

31 Cyc. 1024.

Bars vs. U. S., 20 App. Cas. 232

U. S. vs. Reid, 42 Fed. 134

U. S. vs. Stickle, 15 Fed. 798.

On page 51 of counsel's brief, the statement is made by him that it is a fact that plaintiff in error is the author of one hundred books. In reply to this contention the Government calls attention to the exhibits on file herein which will show that plaintiff in error is now pretending that a few sheets of paper, in some cases not more than five or six, with printed matter upon them, consist of a

separate book. An examination of the literature (pp. 57 and 71 Ex. 3 and 7) of the plaintiff in error will show that reference to these books was deceptive and that any reader of said literature would naturally conclude that they were books which had been printed and of the ordinary size, and not merely scraps of paper.

An examination of the exhibits will further show that the University to which plaintiff in error refers throughout his literature was not in reality a university but was a correspondence course which had no permanent address but which traveled from place to place with plaintiff in error.

In exhibit, entitled "The Newthot Science", page 178, the plaintiff in error says that "Man, through the knowledge and wisdom of Newology may be omnipotent", and in speaking of himself, says:

"MEMORY—I am omnipotent, omniscient and omnipresent and remember all here and now",

but in his direct examination, on page 207, he says:

"It is my religion to forget rather than to remember. It is more important to forget than to remember."

In the cross-examination of plaintiff in error, beginning on page 229, the Court can readily see the disposition on the part of plaintiff in error to

carry out his fraudulent scheme in endeavoring to conceal from the Court any information that might lead to learning his correct age, or any other fact concerning his family relations. His testimony is as follows:

“MR. PRESTON: Well, Doctor, what was your mother’s maiden name?

A. My mother’s maiden name. I will give you the full name. Her name was—Margaret Thot Fair.

Q. Margaret Thot?

A. Thot—Margaret Thot Fair. My grandmother’s name.

Q. I haven’t asked you that at all. I just asked you your mother’s maiden name.—Margaret Thot Fair?

A. Yes. Her spiritual name was N. N. Fair.

Q. We were not asking you about spiritual names just yet. When was your mother born, if you know, sir.

A. I don’t know.

Q. When did she tell you she was born?

A. I don’t know.

Q. Did she ever tell you?

A. I don’t remember.

Q. What?

A. I don’t remember.

Q. Have you now in your possession any of her handwriting?

MR. REISNER: We object to it on the ground that it is immaterial.

THE COURT: Objection overruled.

MR. PRESTON: I want to know who she was.

MR. HONEY: Do you doubt he had a mother?

MR. PRESTON: Q. Have you any of her handwriting?

A. No, but I think I can tell you how to get it.

Q. Well, I don't want to know that now; I just asked you if you had any, have you anything that would prove to us independent of your own statement what her maiden name was?

A. If you will produce the Bible that Mrs. Claire your friend told me that she turned over to you in that I will show you my mother's handwriting.

Q. Well, now, of course you know that is untrue.

A. And there is lots of her writing there.

Q. Just wait a minute. Answer the question.

A. The last of her writings, sir, are in that book, and if I had not been arrested by your scheming I would have had it today.

Q. Well, now, that is immaterial, Doctor.

A. That is true.

Q. But I would like you to tell us whether you have any independent proof of your mother's maiden name?

A. If I had that Bible I would give it to you and if I had not been arrested by your scheming I would have had it.

MR. PRESTON: I would like to have the Court tell this witness I am not on trial here.

THE WITNESS: I know, but I am entitled to my day in court and I believe the judge will give it to me.

MR. REISNER: Doctor, let us refrain from that.

MR. PRESTON: Answer my question, Doctor.

A. I have answered it.

Q. What is in this Bible that you say I have got about your mother? Could you give us some idea about it?

A. Well, I know her writing was in it. I know some of her writing was in it.

Q. Is her birthday in it?

A. Yes, sir.

Q. Don't you know when it was?

A. No, sir, I don't.

Q. Don't you know anything about it at all?

A. I think I remember of reading my father and mother's birthday, but I don't remember it, and the time of her marriage and also the time of my birth and the record in regard to my birth, but the date of the birth of my father and my mother nor my grandparents I cannot remember.

Q. Have you any idea about it?

A. Not at this time, no.

Q. You cannot tell us whether they lived to be 50, 75 or 100 or 1000 years old?

A. I don't know just how old they were.

Q. How old was your father when he died?

A. I don't know.

Q. Do you remember him?

A. Sir?

Q. Do you remember him?

A. Oh, yes; I remember my father.

Q. Do you remember your sister?

A. I remember of seeing her once.

Q. Do you remember any playmates that you had when you were a boy?

A. As I happened, which I am sorry to say—

Q. (Interrupting) Answer my question.

A. I had very few playmates.

Q. Do you remember any playmates?

A. Not at this time.

Q. Where did you attend school?

A. I was educated by a governess and private tutor.

Q. Where?

A. In various cities of the world.

Q. Well, where was the first one?

A. The first one—I was born in New York City. My parents arrived from London, England, or Manchester, England, it was—a quaker city—we stayed at what is called then “Castle Garden” and now called—the name is changed anyway. It was Castle Garden then and we arrived at ten o’clock and I was born at noon.

Q. That is, either Manchester or London?

A. Manchester.

Q. From Manchester, England?

A. From England some place; I think it was Manchester.

Q. Where was this place?

A. Where was it?

Q. Yes, the street number.

A. I was born in a hotel.

Q. What was the name of the hotel?

A. In New York.

Q. What was the name of the hotel?

A. I don’t remember.

Q. Have you ever seen it since?

A. I think I saw it quite a number of years after, as I remember, before it was destroyed.

Q. What year did your parents emigrate to the United States?

MR. REISNER: We object to the question on the ground it is immaterial. There is no issue in this case involving the age of this defendant. It does not make any difference. Suppose he represented here that he was 82 years old. What issue would that be in this case?

THE COURT: Overruled.

MR. PRESTON: Read the question, Mr. Reporter?

(The reporter reads the last question)

A. My parents were American citizens. They did not have to emigrate.

Q. Well, what year was it they made this voyage?

A. I don't know.

Q. Have you any idea?

A. No sir, I do not. If I had remembered all such things as that, sir, I could not have been the head of a great movement.

Q. Do you know whether it was before the Napoleonic wars, or afterwards.

A. When was the Napoleonic wars?

Q. Well, you know when the battle of Waterloo occurred, don't you?

A. When was the Battle of Waterloo?

Q. You don't know?

Q. Don't you know?

A. I am asking you. No, sir, I don't know at this time.

Q. I am not on the witness stand.

A. No, sir, I don't.

Q. Was it before?

A. I don't know those dates very well.

Q. Was it before the Battle of New Orleans or not?

A. Battle of what?

Q. Of January 1st, 1815?

A. I know about it.

Q. I am asking you if your parents came over here at the time you were born before that or after that?

A. I have had no association in regard to that.

Q. Are you familiar with the history of the United States and do you know it to any extent at all?

A. I studied the history of the United States at one time.

Q. Do you remember—

A. When I was a boy.

Q. Do you remember when—do you remember any president by name?

A. Sir?

Q. Do you remember any president by name?

A. I do.

Q. Well, who was President of the United States when you first can remember?

A. I don't remember that.

Q. Did you ever cast a vote? You know what that means, don't you?

A. I understand.

MR. REISNER: We object to that on the ground it is incompetent, irrelevant and immaterial.

THE COURT: Objection overruled.

A. I think that I have voted on some certain occasions.

MR. PRESTON: Q. Well, did you ever vote for electors for the Presidency of the United States?

A. Thus far principally I have been devoting my time to the idea of teaching other things but citizenship, statesmanship, politics and so forth, but since this time I shall change my tactics and vote at every election. I see the necessity of it.

MR. PRESTON: I move that answer be stricken out and the witness be instructed by the Court to answer.

THE COURT: The question is, did you ever vote for the Presidential Elector, Doctor?

Q. Do you remember of any election at which you voted?

A. I remember a good number of elections but I don't know which ones they were. Being an American, I have watched those things closely in order to be able to write on politics, statesmanship, citizenship and the like.

Q. Do you remember the Civil War?

A. I know of the Civil War.

Q. Do you remember it?

A. I know something about it.

Q. Where were you when Fort Sumter was fired on?

A. Now I want to ask your Honor, in the first place I want to say this—that my religion—

Q. My religion means relation to life. It is my religion and now if I must be harangued in regard to a few years, more or less, and my religion assailed in this way I would like to know it now.

THE COURT: You will find out when you answer these questions.

THE WITNESS: Sir.

THE COURT: You will find out when you answer these questions. Answer these questions, if you can.

A. The most of them I cannot answer because, as I say, my religion is absolutely not to

count time by days and years and if I had counted time by days and years I would not have been here before a jury of my peers.

THE COURT: Now, that may be quite true, Doctor, but the present question is, where were you when Fort Sumter was fired on?

A. I don't know.

THE COURT: Well, if you had said that in the beginning we would have saved time.

MR. PRESTON: Q. Do you remember John Brown's raid?

A. I either knew of it or read of it.

Q. Were you in existence at that time?

A. It might be so.

Q. Well, don't you know whether you were in the flesh at that time or not?

A. It perhaps is so.

Q. Well, don't you know whether it is so or not?

A. I might say that there was a possibility of it.

Q. Do you remember the Lincoln-Douglas debate?

A. I know something about it.

Q. Were you at the debate?

A. Either in person or by hearing one another. I don't know just how I got my information.

Q. Don't you know whether you were living or dead at the time?

A. We have always lived, for that matter, before the world was."

In conclusion the Government is of the opinion that the evidence to which the Court's attention has been called shows beyond any question a fraudulent scheme on the part of plaintiff in error. In fact, the jury so found, and the evidence presented to them is sufficient to support their finding.

The Court will recall that a corporation was first organized in New York and stock was sold to Mrs. Ida B. Stetson, Mrs. Florence K. White, Mr. C. A. Leach and Mrs. Johnson, for which several hundred dollars were obtained. This corporation was organized for the purpose of publishing the same books that a corporation was subsequently organized in Seattle, Washington. The Seattle corporation was abandoned the same as the New York corporation. Later, a corporation was organized in Los Angeles for the same purpose that the New York and Seattle corporations were organized and after several hundred dollars were secured there by the plaintiff in error, the Los Angeles corporation was abandoned and the San Francisco corporation was organized. The feature of the San Francisco corporation which was organized for the purpose of publishing the books and to which attention has been called, showing in a most conclusive manner the fraudulent scheme on the part of the plaintiff in

error, is the fact that the plaintiff in error claims to have invested \$990,000 worth of stock and \$10,000 more was subscribed by M. L. Claire. There was no more stock issued in this corporation, consequently in order to obtain money, it would have been necessary for plaintiff in error to have transferred his own personal stock. This is the scheme which he evidently pursued throughout; instead of issuing treasury stock in the corporation he would issue his own personal stock, pocket the money and thus leave the corporation in a condition where it was impossible for it to publish the books, and defeat the purpose for which the corporation was supposed to be organized. So, we have a complete failure of four different corporations organized by plaintiff in error for the purpose of publishing the same books. The organization of these corporations; the sending of the letter to Dr. Claire; the pretension on his part that he was much older than he really was, for the purpose of leading people to believe that there was some merit in his contention of the immortality of the body; the further fact that plaintiff in error placed his picture in the book which was published by his father or some other person, and endeavored to lead the people to believe that it was his own publication; was cavorting around the country with another man's wife; set forth matters in his book to which this Court's attention has already been directed which are false upon their face; and for the various other reasons already referred to, and which more fully appear in

the exhibits on file herein, causes the Government to feel that there was no error committed and that the verdict of the Jury and the judgment of the Court should not be disturbed.

Respectfully submitted,

JOHN W. PRESTON,
United States Attorney

CASPER A. ORNBAUN,
Assistant United States Attorney,

Attorneys for Defendant in Error.

United States
Circuit Court of Appeals

For the Ninth Circuit.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Plaintiff in Error,

vs.

TONY POSSUS,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Territory of Alaska, Third Division.

No. 2949

United States
Circuit Court of Appeals
For the Ninth Circuit.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Plaintiff in Error,

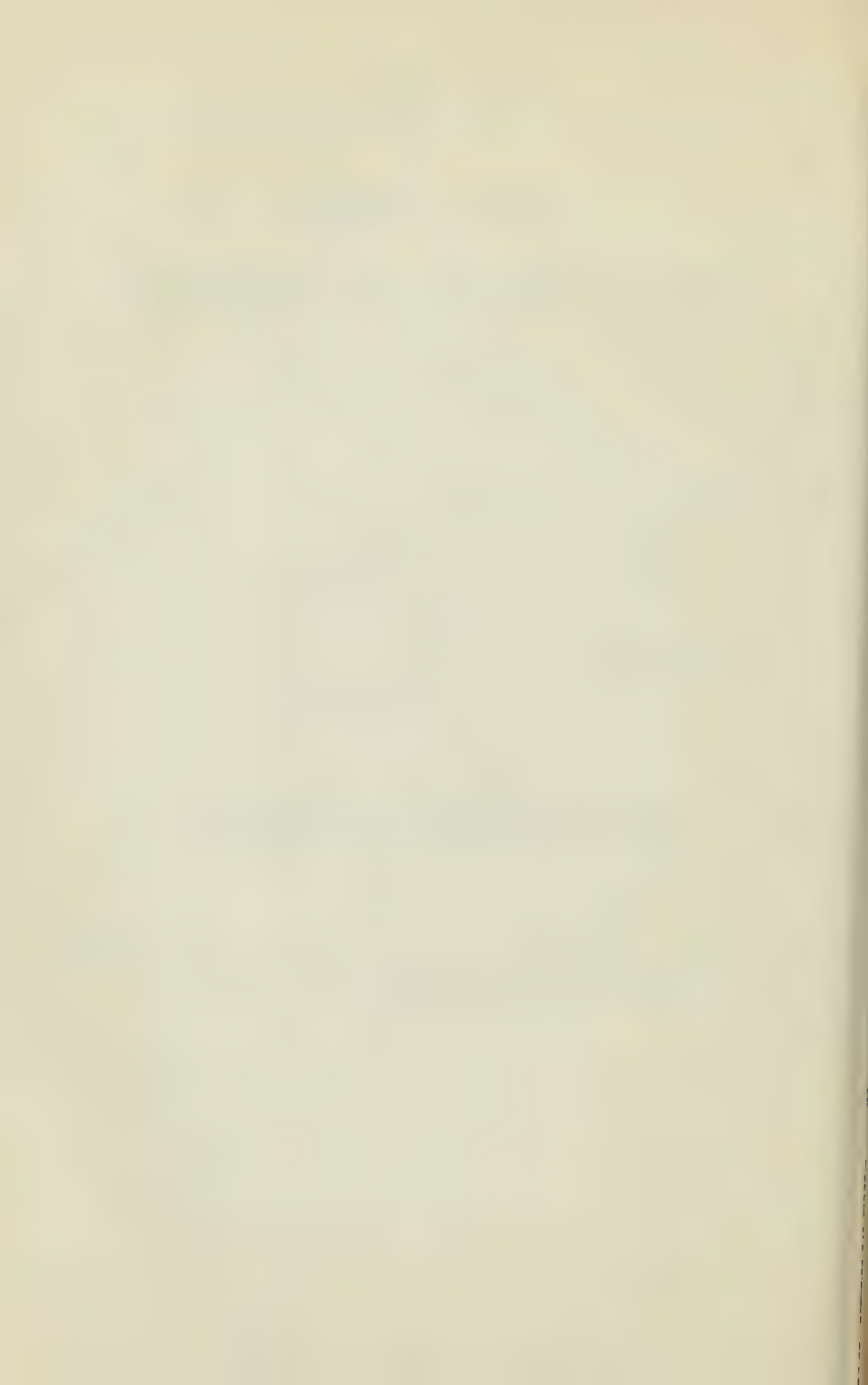
vs.

TONY POSSUS,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Territory of Alaska, Third Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the District Court for the Territory of Alaska,
Third Division.*

Names and Addresses of Attorneys of Record.

LYONS and RITCHIE, Valdez, Alaska,

Attorneys for Plaintiff and Defendant in Error.

DONOHOE and DIMOND, Valdez, Alaska,

W. S. BONNIFIELD, Valdez, Alaska,

Attorneys for Defendant and Plaintiff in Error.

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Bill of Exceptions.

Comes now the above-named defendant, the Ellamar Mining Company of Alaska, a corporation, and being about to prosecute a Writ of Error to the Circuit Court of Appeals for the Ninth Circuit from the Judgment made and entered herein by the above-named court on the 9th day of January, 1917, and files herein and petitions and prays said above-named court to settle and sign and have made a part of the record upon such Writ of Error, the hereinafter mentioned exceptions, all of which appear of record herein and are hereinafter fully set forth;

defendant's said Bill of Exceptions on such Writ of Error to consist of the following records, files, papers and proceedings, filed, had and done herein, to wit:

Plaintiff's Third Amended Complaint;

Defendant's Demurrer to Plaintiff's Third Amended Complaint;

Minute Order of Court Overruling Defendant's Demurrer to Plaintiff's Third Amended Complaint; said minute order being made and entered on the 28th day of December, 1916, entered Court Journal II, page 84;

Defendant's Answer to Plaintiff's Third Amended Complaint;

Plaintiff's Motion to Strike Parts of Defendant's Answer;

Order of Court Striking Parts of Defendant's Answer;

Defendant's Amended Answer to Plaintiff's Third Amended Complaint;

Plaintiff's Reply;

Journal Record of Proceedings Had at Trial, Court Journal II, pages 97 to 100, inclusive;

Certified Transcript of Record of Evidence and Proceedings at Trial by the Court Reporter;

Verdict and Special Finding of Jury;

Motion of Defendant for Judgment in Its Favor Notwithstanding the Verdict of the Jury;

Minute Order Denying Motion of Defendant for Judgment Notwithstanding the Verdict, entered the 9th day of January, 1917, entered Court Journal II, page 106;

Motion for New Trial by Defendant;

Minute Order of Court Denying Defendant's Motion for New [1*] Trial, made the 9th day of January, 1917, entered Court Journal No. II, page No. 106;

Remittitur of Part of Verdict by the Plaintiff; Judgment;

Minute Order of Court Granting Defendant Until the 15th day of February, 1917, to Prepare, File and Settle Its Bill of Exceptions on Writ of Error; Court Journal No. II, page 107;

Order of Court Made the 13th Day of February, 1917; Enlarging Time for Preparing, Filing and Settling Bill of Exceptions Until March 10, 1917;

Order Settling and Certifying Bill of Exceptions.

DONOHUE & DIMOND, and
W. S. BONNIFIELD,

Attorneys for the Defendant and Plaintiff in Error.

Service of the foregoing proposed bill of exceptions and of all papers, records and proceedings therein named, by receipt of copy thereof acknowledged at Valdez, Alaska, this 16th day of February, 1917.

LYONS & RITCHIE,

Attorneys for the Plaintiff and Defendant in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 19, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Third Amended Complaint.

Now comes the plaintiff and by leave of Court files this, his third amended complaint, and alleges:

I.

That defendant is a corporation organized under the laws of the State of Washington and doing business in Alaska. At all times hereinafter mentioned defendant was engaged in operating a copper mine at Ellamar, Alaska, in the Third Judicial Division of said territory.

II.

On or about January 12, 1916, and for about eight months prior thereto plaintiff was in the employ of defendant as a miner, usually engaged in operating a machine drill. On the date named plaintiff was working on the night shift on the 100-foot level of said company's mine. At about eight o'clock P. M. he and another miner named Louis —, who was working with him, were ordered by the shift boss, Oscar Johnson, to leave their work and go to another

part of the mine to assist in removing a slide that had just fallen. In order to reach the slide they were directed by said shift boss to ride upon a car down a track which ran to the glory-hole about 1000 feet distant. Plaintiff and said Louis mounted said car and started [3] the same down the track, plaintiff riding in front. At the end of the track the car ran against a rock wall at the edge of the glory-hole. In the contact of the car with said wall plaintiff was pinned under the car and sustained the following injuries, to wit, fracture of the right clavicle with separation limiting the motion of the right arm and shoulder; a severe bruise adjacent to the left eye which temporarily destroyed the sight so that the same was not fully restored for three months; a violent blow upon the jaw which badly bruised the same, knocked out one tooth, broke another tooth and partially paralyzed the use of the jaw for three months.

III.

Plaintiff alleges that at the time of suffering said injury he was a strong, healthy man, 33 years of age, an experienced and competent hard rock miner and experienced drill man, able to earn the highest wages paid for such work, and at that time was receiving four dollars a day from defendant for his work. He has a mother dependent upon him for support. He is unable to state, and is informed by competent surgical advice that surgical skill cannot determine positively to what extent, if any, his said injury caused permanent disability, but he believes that

the same caused total disability for at least six months, and permanent disability to the extent of at least one-third of his earning power, all to his damage fourteen hundred dollars (\$1400).

For a second cause of action against defendant corporation plaintiff alleges:

I.—II.

That he adopts as part of his second cause of action paragraphs I and II of his first cause of action and makes them paragraphs I and II of his second cause of action, as if they were reincorporated here. [4]

III.

Plaintiff had been working in said mine for eight months prior to the date of said accident, and according to the rules of said mine the sum of \$1.50 per month had been deducted from his wages for hospital dues, which entitled him to care in a hospital and to competent surgical and medical attendance at the expense of defendant in case of his injury or illness arising in the course of his employment. Plaintiff alleges that after said accident he was taken to a house used by defendant as a hospital and kept there about twelve days, but no qualified surgeon or physician was in attendance upon him at any time, and no examination of his injuries was made or attempted to be made except by a woman who had charge of said hospital, one Mrs. Tramontine, who was not a physician or surgeon or even a trained nurse. He was assured by said woman that he had no injury except bruises on the flesh; that no bones were broken and that he would speedily recover

and soon be able to resume work. About twelve days after his said injuries were suffered he was ordered out of the hospital by the general foreman, one Gedney, although he was still very weak and ill and in no way recuperated from his said injuries and his bone fracture was entirely uncared for. He received no further care, attention or assistance from defendant, or any of its officers or agents. He alleges that during his stay in the hospital his injuries were not properly or sufficiently dressed and medicated and no care whatever was given to his broken clavicle. Plaintiff is advised by competent physicians and surgeons that owing to the lapse of time since the fracture of his clavicle occurred the bone can only be restored or partially restored by an expensive surgical operation, and that because of the lapse of time it is doubtful whether it can be restored to its former strength even by the necessary operation; that it is highly probable that the original injury to his shoulder is so greatly aggravated by the delay in rectifying [5] the same that it will never recover much of its former strength so that he can resume his former occupation, and that he may never be able again to perform gainful manual labor. At this time the fracture of said clavicle is ununited so that the separation limits the motion of the right arm and shoulder and prevents their use in the performance of manual labor or active physical exertion. Plaintiff alleges that because of the wilful failure and refusal of defendant to give him the timely and necessary surgical care to which he

was entitled as aforesaid he has suffered great physical pain and mental torture for a long time after he might have recovered as fully as the nature of his injury permitted, through proper surgical and medical care, and still suffers some pain from his said injury. That said unnecessary suffering has been due wholly to the gross negligence and the wilful failure and refusal of defendant to give him the surgical attention and medical attendance to which he was entitled as aforesaid, and his present impaired physical condition is largely due to the same gross and wilful negligence of defendant, and the aggravation of his disability beyond the normal result of his original injury is wholly due to that cause. At the time he suffered said injury he was a strong, healthy man, 33 years of age, an experienced and competent hard rock miner and experienced drill man, able to earn the highest wages paid for such work, and at that time he was receiving from defendant four dollars a day for his work.

IV.

Plaintiff alleges that because of defendant's neglect and refusal to furnish him timely and sufficient surgical care and medical and hospital service which aggravated the result of his original injuries as aforesaid, and his permanent disability and the unnecessary physical and mental suffering he has undergone he has been damaged fifteen thousand dollars (\$15,000). [6]

WHEREFORE, plaintiff asks judgment against defendant on his first cause of action for the sum

of fourteen hundred dollars; on his second cause of action for the sum of fifteen thousand dollars and for the costs of this action.

LYONS & RITCHIE.

United States of America,
Territory of Alaska,—ss.

Tony Possus, being duly sworn, says he is the plaintiff in this action; that he has read the foregoing third amended complaint and he believes the same to be true.

TONY POSSUS.

Subscribed and sworn to before me this 28th day of December, 1916.

[Seal]

JOHN LYONS,
Notary Public.

My commission expires November 27, 1920.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 28, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [7]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Defendant's Demurrer to Plaintiff's Third Amended Complaint.

Comes now the above-named defendant and demurring to plaintiff's third amended complaint for cause of demurrer, alleges:

I.

That it appears upon the face of the said third amended complaint that several causes of action have been improperly united in this:

(a) Plaintiff's first cause of action as set forth in his third amended complaint is an action *ex delicto*, having for its foundation an alleged tort of the defendant; and plaintiff's said second cause of action is an action *ex contractu*, the foundation of which is an alleged breach of a hospital contract between plaintiff and defendant and the allegations contained in plaintiff's said second cause of action do not bring it within the rule that would permit the plaintiff to waive his contract and sue in tort as he nowhere alleges misfeasance on the part of the defendant in connection with said hospital contract, but does allege nonfeasance or failure on the part of defendant to perform its part of said contract.

(b) Plaintiff's first cause of action as set forth in said third amended complaint is a special statutory proceeding, that is, a proceeding to recover compensation for an injured employee under the provisions of Chapter 71 of the Session Laws of the Territory of Alaska, for the year 1915, which is an act entitled, "An Act relating to the measure and recovery of compensation of injured employees in the

mining industry of this Territory, and the compensation to designated beneficiaries where such injuries result in death, defining and regulating the liability [8] of employers to their employees in connection with such industry, and repealing all acts and parts of acts in conflict with this act.”

This act provides a special measure of damages to be ascertained by special rules and procedure and cannot be joined with a common-law action as pleaded in plaintiff’s said second cause of action for the reason that the measure of damages and the rules of procedure governing the trial of said second cause of action are entirely different from that of the said first cause of action.

(c) Plaintiff in his first cause of action seeks to obtain compensation for his present permanent disability under the provisions of Chapter 71 of the Session Laws of the Territory of Alaska, for the year 1915, of which the accident occurring in the defendant’s mine on the 12th day of January, 1916, was the proximate cause and he cannot join with such an action his second cause of action in which he seeks to recover damages for a portion of his present alleged injuries for the reason that his entire injuries growing out of said accident and of which said accident is the proximate cause will be fully compensated in his first cause of action.

II.

Defendant demurs to plaintiff’s second cause of action set forth in plaintiff’s third amended complaint on the ground that there is another cause of action pending between the plaintiff and defendant

for the same cause set forth in the said second cause of action, to wit: Plaintiff's first cause of action. In this cause of action plaintiff seeks to recover damages and compensation for an injury received by him in the course of his employment as a miner in the employ of the defendant and under the terms of said Chapter 71 of the Session Laws of Alaska, for the year 1915, he is entitled to be compensated for any defects he has sustained and now has, of which the original injury was the proximate cause, and it is immaterial whether his alleged permanent injury was enhanced or aggravated by the lack of proper hospital treatment or not. [9] The defendant in the first cause of action will be required to compensate the plaintiff for all injury he now sustains which grew out of the original injury set forth in said first cause of action. To permit the plaintiff to maintain his second cause of action would be to compel the defendant to answer the same charge twice and compel the defendant to answer twice in damages for the same cause of action.

III.

The defendant demurs to plaintiff's second cause of action contained in plaintiff's said third amended complaint on the ground that it does not state facts sufficient to constitute a cause of action in favor of plaintiff and against defendant.

Dated at Valdez, Alaska, this 28th day of December, 1916.

DONOHUE & DIMOND,
Attorneys for Defendant.

I hereby acknowledge service of the above and foregoing demurrer to plaintiff's third amended complaint, by receiving a copy thereof this 28th day of December, 1916.

LYONS & RITCHIE,
Attorneys for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 28, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [10]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

**Minute Order Overruling Demurrer to Plaintiff's
Third Amended Complaint.**

Now on this day this demurrer came on to be heard, Lyons & Ritchie appearing as attorneys for plaintiff and Donohoe & Dimond and W. S. Bonni-field appearing as attorneys for defendant, and after argument had, and the Court being fully advised in the premises,

IT IS ORDERED that said demurrer be, and the same is hereby overruled, to which ruling and order of the court defendant excepts and exception is al-

lowed, and defendant is given until December 29th, in which to answer and the plaintiff is given until December 30, 1916 in which to reply.

September 1916, Term—December 28th, 1916—
76th Court Day—Thursday.

Entered Court Journal No. II, page 84. [11]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Answer to Plaintiff's Third Amended Complaint.

Comes now the above-named defendant and for answer to plaintiff's third amended complaint admits, denies and alleges, as follows:

I.

Referring to the first paragraph of plaintiff's first cause of action, defendant admits the same.

II.

Referring to the second paragraph in plaintiff's first cause of action defendant denies that in the accident therein described, or at all, plaintiff's right clavicle was fractured with separation limiting the motion of his right arm and shoulder or that his said clavicle was fractured or broken at all or that

the motion of his right arm or right shoulder was in any manner limited other than such as bruises of the flesh and muscles would cause; denies that the sight of his left eye was temporarily destroyed or destroyed at all or in any manner impaired; denies that his jaw was partially paralyzed or paralyzed at all and as to the other matters and things in said paragraph contained defendant admits the same.

III.

Referring to the third paragraph of plaintiff's first cause of action defendant admits that plaintiff is about 33 years of age and at the time of receiving said accident he was receiving from said defendant \$4 per day for his work and as to each and every other allegation in said paragraph contained, defendant denies the same. [12]

For a separate answer and by way of affirmative defense to plaintiff's first cause of action defendant alleges:

I.

The defendant admits that the plaintiff was in its employ on the 12th day of January, 1916, and on said day in the course of his employment, as a miner, met with an accident in which he received certain injuries consisting of bruises on his right shoulder, a bruise adjacent to his left eye and a bruise on his jaw but did not have his right clavicle broken; that on or about the 8th day of February thereafter, the defendant caused said plaintiff to be thoroughly examined by a competent physician and surgeon authorized to practice medicine under the laws of

Alaska who after such examination informed said plaintiff and informed the officers of said defendant in charge of the defendant's mining operations at Ellamar that said plaintiff was entirely recovered from said injuries; that from the time of said accident, to wit, the 12th day of January, 1916, until said examination, to wit, the 8th day of February, 1916, defendant furnished plaintiff with board and lodging and had his wounds properly dressed and cared for by a competent and experienced nurse; that shortly after said physician and surgeon notified said plaintiffs aforesaid, that he, the plaintiff had fully recovered from the injuries he received in said accident plaintiff voluntarily left Ellamar, Alaska, and without the defendants knowledge and without making any demand whatever on the defendant for compensation for his said injuries; that the defendant or none of its officers, had any knowledge of the whereabouts of said plaintiff from the time he left Ellamar, as aforesaid, until on or about the 15th day of April, 1916, at which time the defendant company received a letter from plaintiff's attorneys, Lyons & Ritchie, of Valdez, Alaska, stating that plaintiff claimed compensation for the injury received in said accident, whereupon, the defendant on the 22d day of April, 1916, notified said plaintiff through his said attorneys that said defendant then had in its employ at Ellamar, [13] Alaska, a competent physician and surgeon authorized to practice medicine under the laws of the Territory of Alaska and the said defendant requested plaintiff to immediately submit to an examination by said physician and sur-

geon for the purpose of ascertaining the extent of said alleged injuries, and then and there offered to provide plaintiff with free transportation and all expenses that plaintiff might be put to in going from Valdez to Ellamar and return; that said plaintiff absolutely refused to submit himself to such examination.

II.

That thereafter and on the 23d day of August, 1916, defendant again served upon plaintiff a written demand that he submit to an examination for the purpose of ascertaining the extent of his alleged injuries in words and figures, as follows, to wit:

“To Mr. Tony Possus of Valdez, Alaska, and Messrs.

Lyons & Ritchie, of Valdez, Alaska, His Attorneys:

Gentlemen:

In regard to your claim against the Ellamar Mining Company of Alaska for personal injuries, which you claim to have received while in the employ of this company, and which you claim resulted in the fracture of your clavicle, we call your attention to the fact that sometime ago Ellamar Mining Company requested you to submit to an X-ray examination of your shoulder for the purpose of ascertaining whether your clavicle was really fractured or not and that you have failed to do so. The Ellamar Mining Company of Alaska at this time informs you that it now maintains at Ellamar, Alaska, a first class hospital, equipped with all modern surgical appliances, including an X-ray, and has in attendance a first class physician and surgeon.

The company now makes you the following offer, It will either take you in the company's launch or pay your transportation from Valdez to Ellamar, at which place the Company's surgeon will make an X-ray examination of that portion of your clavicle you claim has been broken, and make a general and thorough physical examination of you, and perform any necessary operation for the purpose of correcting and healing any fracture of your clavicle, if such exists, and will furnish you with first class hospital accomodations for the operation and until you are discharged as cured by the company's physician and surgeon. In other words, it will furnish you free transportation to Ellamar, hospital accomodations and physician and surgeon for an examination, operation, if necessary, and until you have entirely recovered. The company will also settle such claims in cash as you may be entitled to during the time you have [14] been disabled under the provisions of Chapter 71 of the Session Laws of the Alaska Legislature of the year 1915.

Please let the company know at an early date as possible whether you accept or reject this offer."

That shortly thereafter, pursuant to the foregoing demand, plaintiff did submit himself to an examination at Ellamar, Alaska, by the defendant's physician and surgeon who is authorized to practice medicine under the laws of the Territory of Alaska, and an X-Ray photograph taken of plaintiff's right clavicle disclosed that said right clavicle was not broken or fractured at the time of said examination, and plaintiff did not then claim that said clavicle was broken

and used his right arm and shoulder freely and in such positions that had his right clavicle been broken it would have been impossible for him to have done so; but plaintiff did claim that his muscles about his clavicle and right arm were sore; the defendant thereupon, acting through his said physician and surgeon, offered to furnish plaintiff board and lodging free and to give him daily massage treatment of the muscles for the purpose of relieving them of the alleged soreness and to continue this treatment and such other treatment as might be necessary until plaintiff was entirely relieved of said soreness; this offer plaintiff positively refused and thereupon demanded of defendant the sum of twenty-five hundred dollars, and upon the defendant refusing to pay said sum plaintiff departed from Ellamar and refused to permit said physician and surgeon to treat him in any manner whatever.

III.

Defendant alleges that plaintiff is not permanently injured in any degree whatever and is not suffering from any permanent disability whatever in any manner arising from the injuries received in said accident or of which the injuries received in said accident are the proximate cause; that the injuries received in said accident did not cause plaintiff a temporary disability for a period longer than three months and a half, which under the provision of Chapter 71 of the Session Laws of the Territory of Alaska, for the year 1915, would entitle [15] plaintiff to the sum of two hundred and ten dollars

for which amount the defendant hereby tenders plaintiff judgment.

IV.

Defendant further alleges that it has at all times since said accident and now is able, ready and willing to compensate plaintiff in accordance with the provisions of Chapter 71 of the Session Laws of the Territory of Alaska, for the year 1915, for any and all injuries he received by said accident or for any injury he now sustains of which the injuries received in said accident were the proximate cause.

Referring to plaintiff's second cause of action contained in plaintiff's third amended complaint, defendant admits, denies and alleges as follows:

I.

Referring to the first paragraph of plaintiff's second cause of action, defendant admits the same.

II.

Referring to the second paragraph in plaintiff's second cause of action, defendant denies that in the accident therein described, or at all, plaintiff's right clavicle was fractured with separation limiting the motion of his right arm and shoulder, or that his said clavicle was fractured or broken at all, or that the motion of his right arm or right shoulder was in any manner limited other than such as bruises of the flesh and muscles would cause; denies that the sight of his left eye was temporarily destroyed or destroyed at all or in any manner impaired; denies that his jaw was partially paralyzed or paralyzed at all, and as to the other matters and things in said paragraph contained defendant admits the same.

III.

Referring to the third paragraph of plaintiff's second cause of action, defendant admits that plaintiff had been working in said mine for eight months prior to the date of said accident, and according to the rules of said mine the sum of \$1.50 per month was deducted from his wages [16] for hospital dues, and defendant admits that at the time of the accident to plaintiff he was employed by defendant as a miner and was receiving \$4 per day for his work; defendant denies each and every other allegation in said paragraph contained except as the same is specifically admitted in the affirmative defense to plaintiff's said second cause of action.

IV.

Referring to the fourth paragraph of plaintiff's second cause of action, defendant denies each and every allegation therein contained.

For a separate answer and by way of affirmative defense to plaintiff's second cause of action defendant alleges:

I.

That at the time of said accident and for seven years prior thereto the defendant did not maintain a hospital at its mine at Ellamar, Alaska; that all the employees of said defendant, including this plaintiff, well knew that said defendant did not maintain a hospital at its said mine, and did not have a physician and surgeon in attendance at said mine, but for many years prior to said accident and at the time of said accident it was the custom and rule of said defend-

ant mining company to maintain at its mine at Ellamar certain medicines, liniments, bandages and other appliances for the purpose of giving first aid to injured employees, and for treating slight injuries that any of its employees might receive; that in case of serious injuries to any of its employees it was the rule and custom of said defendant to send its employees who were seriously injured to Valdez or Cordova for treatment by physicians and surgeons who might be practicing their profession at either of said places; plaintiff during all the time he was in defendant's employ and at the time of said accident knew of this rule and custom and at the time, the sum of \$1.50 per month was deducted from his wages, knew of this rule and custom, and knew that this would be the character and kind of medical aid and treatment he would receive should he meet with an accident while in defendant's employ. [17]

II.

That at the time of said accident and for a short time prior thereto the defendant, in order to better care for its employees, who were slightly injured and to better administer first aid to those who might be seriously injured, equipped a temporary hospital and employed a competent and experienced nurse, which said nurse was in attendance at the time of said accident. Immediately after said accident plaintiff was taken to said temporary hospital where his wounds and bruises were properly cleansed, medicated and bandaged, and plaintiff remained in said temporary hospital for a period of three weeks, during all of which time said nurse was in attend-

ance and properly medicated plaintiff's said wounds and bruises and properly cared for said plaintiff, and during all of said time plaintiff made no complaint of the attention he was receiving and did not state or in any manner intimate that he had any fractured bones as a result of said accident, and did not during any of said time demand or request of any of the officers of the defendant or of said nurse that he be examined or treated by physicians or surgeons. That on or about the 3d day of February, 1916, plaintiff, of his own volition and of his own desire left said temporary hospital and took up his lodgings in the defendant company's bunk-house and took his meals regularly at the defendant company's dining house. That thereafter on or about the 8th day of February, 1916, the defendant company caused said plaintiff to be examined by a competent and experienced physician and surgeon authorized to practice medicine under the laws of the Territory of Alaska, for the purpose of ascertaining if said plaintiff was then suffering from any injuries as the result of said accident; that said physician and surgeon thereupon made a careful and thorough examination of said plaintiff, and after completing said examination informed plaintiff and the officers of said defendant company that plaintiff had no broken or fractured bones and that he was not in any manner suffering from any injuries received in said accident and [18] that there was no reason whatever why plaintiff should not immediately resume work; that plaintiff at the time of said examination did not claim that his right clavicle was fractured or that

the motion of his right arm and shoulder was in any manner limited and did not make any demands upon the defendant company or its officers for any further medical treatment or for any further services of a physician or surgeon, and shortly thereafter departed from Ellamar and defendant heard nothing of plaintiff and did not know of his whereabouts for more than two months thereafter.

III.

That on or about the 20th day of February, 1916, the defendant established at Ellamar a complete hospital equipped with all modern surgical appliances, including an X-ray, and employed a competent and experienced physician and surgeon who was authorized to practice medicine under the laws of the Territory of Alaska, and ever since said date has maintained said hospital and has had in attendance said physician and surgeon.

IV.

That on or about the 15th day of April, 1916, the defendant company received a letter from plaintiff's attorneys, Lyons & Ritchie, of Valdez, Alaska, in which it was stated that plaintiff claimed compensation for injuries he had received in said accident to which said letter the defendant, on the 22d day of April, 1916, made a written demand on plaintiff to submit himself to an examination, which said written demand was in words and figures as follows:

“Messrs. Lyons & Ritchie, Valdez, Alaska.

Gentlemen:

Mr. L. L. Middelkamp, for the Ellamar Mining Company of Alaska, has called our attention to your

letter to him of recent date in which you call to the attention of the Company the claim of Tony Possus, or Tony Passiu, or Tony Passu, against it for compensation for an injury to the latter while in the employ of the Company at its mine at Ellamar, Alaska.

Mr. Middelkamp states that the Company has a physician and surgeon in its employ at Ellamar, Alaska, authorized to practice medicine under the laws of the Territory of Alaska, and that the Company wishes to have an examination of the your client made by such physician. The Company, therefore, requests Mr. Passos that he submit [19] himself to examination by the Company's said physician at Ellamar, Alaska, forthwith, and the company will pay and advance to him upon demand at our office the necessary transportation charges and expenses from Valdez to Ellamar and return, or will furnish such transportation. The Company of course cannot pay any transportation or any expenses whatsoever for any other surgeon or physician who may desire, or whom Mr. Passos may desire, to be present at such examination. If, upon such examination, it is found that Mr. Passos is suffering from any physical injury incurred in his employment at Ellamar, Alaska, the Company is willing to give proper treatment for such injuries. It is obviously impossible to make any settlement until such examination has been made as herein requested."

That plaintiff refused to submit himself to the examination requested by the defendant and refused

to go to Ellamar for the purpose of being examined or treated by defendants physician and surgeon.

V.

That thereafter and on the 23d day of August, 1916, defendant served upon plaintiff a written demand that he submit to an examination for the purpose of ascertaining the extent of his alleged injuries in words and figures, as follows, to wit:

“To Mr. Tony Possus of Valdez, Alaska, and Messrs. Lyons & Ritchie, of Valdez, Alaska, His Attorneys:

Gentlemen:

In regard to your claim against the Ellamar Mining Company of Alaska for personal injuries, which you claim to have received while in the employ of this company, and which you claim resulted in the fracture of your clavicle we call your attention to the fact that some time ago Ellamar Mining Company requested you to submit to an X-ray examination of your shoulder for the purpose of ascertaining whether your clavicle was really fractured or not and that you have failed to do so.

The Ellamar Mining Company of Alaska at this time informs you that it now maintains at Ellamar, Alaska, a first class hospital, equipped with all modern surgical appliances, including an X-ray, and has in attendance a first class physician and surgeon.

The Company now makes you the following offer. It will either take you in the company's launch or pay your transportation from Valdez to Ellamar, at which place the Company's Surgeon will make an X-ray examination of that portion of your clavicle

you claim has been broken, and make a general and thorough physical examination of you, and perform any necessary operation for the purpose of correcting and healing any fracture of your clavicle, if such exists, and will furnish you with first class hospital accommodations for the operation and until you are discharged as cured by the Company's physician and surgeon. In other words, it will furnish you free transportation to Ellamar, hospital accommodations and physician and surgeon for an examination, operation, if necessary, and until you have entirely recovered. The Company [20] will also settle such claims in cash as you may be entitled to during the time you have been disabled under the provisions of Chapter 71 of the Session Laws of the Alaska Legislature of the year 1915.

Please let the company know at an early date as possible whether you accept or reject this offer."

That shortly thereafter, pursuant to the foregoing demand, plaintiff did submit himself to an examination at Ellamar, Alaska, by the defendant's physician and surgeon, who is authorized to practice medicine under the laws of the Territory of Alaska and an X-ray photograph taken of plaintiff's right clavicle disclosed that said right clavicle was not broken or fractured at the time of said examination and plaintiff did not then claim that said clavicle was broken and used his right arm and shoulder freely and in such positions that had this right clavicle been broken it would have been impossible for him to have done so; but plaintiff did claim that his muscle about his clavicle and right arm were sore; the defendant

thereupon, acting through his said physician and surgeon, offered to furnish plaintiff board and lodging free and to give him daily massage treatment of the muscles for the purpose of relieving them of the alleged soreness and to continue this treatment and such other treatment as might be necessary until plaintiff was entirely relieved of said soreness; this offer plaintiff positively refused and thereupon demanded of defendant the sum of twenty-five hundred dollars, and upon the defendant refusing to pay the said sum, plaintiff departed from Ellamar and refused to permit said physician and surgeon to treat him in any manner whatever.

WHEREFORE, defendant prays that plaintiff take nothing by reason of the matter and things set forth in said complaint other than a judgment for \$210.00 for temporary disability for a period of three months and a half.

DONOHOE & DIMOND,
Attorneys for Defendant. [21]

United States of America,
Territory of Alaska,—ss.

T. J. Donohoe, being first duly sworn, deposes and says: That I am the agent appointed by the defendant company upon whom service of Summons might be made within the Territory of Alaska, that I make this verification on behalf of defendant company; that I have read the foregoing answer and know the contents thereof and that the same is true as I verily believe.

T. J. DONOHOE.

Subscribed and sworn to before me this 29th day of Dec., 1916.

[Seal]

GEO. J. LOVE,

Notary Public in and for the Territory of Alaska.

My commission expires —.

I hereby accept service of the above and foregoing answer, by receiving a copy thereof, this 29th day of December, 1916.

LYONS & RITCHIE,

Attorneys for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 29, 1916. Arthur Lang, Clerk. [22]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation.

Defendant.

Motion to Strike from Defendant's Answer.

Now comes plaintiff by his attorneys, Lyons & Ritchie, and moves the Court for an order striking from defendant's answer as irrelevant and redundant, the following:

I.

All of paragraph I of the affirmative defense to

plaintiff's first cause of action after the word "nurse" in the sixteenth line of said paragraph.

Also all after the word "sore" in the fifteenth line of page 4 of said affirmative defense to the end of paragraph II.

Also all of paragraph IV of said affirmative defense.

II.

The following in paragraph II of the affirmative defense to plaintiff's second cause of action, on page 7 of said answer: "in order to better care for its employees, who were slightly injured and to better administer first aid to those who might be seriously injured."

Also the following at the end of said second paragraph, on page 8: "and shortly thereafter departed from Ellamar and defendant heard nothing of plaintiff and did not know of his whereabouts for more than two months thereafter."

Also all of paragraphs III and IV of said affirmative defense to said second cause of action.

Also all of paragraph V of said affirmative defense to the second cause of action, on page 10 of said answer, after the word "refused" in the 23d line of said page 10.

LYONS & RITCHIE,
Attorneys for Plaintiff.

Copy received December 30, 1916.

DONOHUE & DIMOND,
Attorneys for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 30, 1916.

Arthur Lang, Clerk. By T. P. Geraghty, Deputy.
[23]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation.

Defendant.

**Order Striking Parts of Defendant's Answer to
Plaintiff's Third Amended Complaint.**

This matter coming on regularly to be heard in open court on the 30th day of December, 1916, on plaintiff's motion for an order striking certain parts of defendant's answer to plaintiff's third amended complaint, and the Court having heard the motion and being fully advised in the premises, makes the following order:

I.

IT IS ORDERED that that portion of the first paragraph of defendant's affirmative defense to plaintiff's first cause of action commencing with the word "that," in the sixteenth line, and ending with the word "or," in the twenty-third line, be stricken on the ground that the same is irrelevant and redundant matter. The portion of the paragraph stricken is as follows:

“that shortly after said physician and surgeon notified said plaintiff as aforesaid that he, the plaintiff, had fully recovered from the injury he received in said accident plaintiff voluntarily left Ellamar, Alaska, and without the defendant’s knowledge and without making any demand whatever on the defendant for compensation for his said injuries; that the defendant or none of its officers had any knowledge of the whereabouts of said plaintiff from the time he left Ellamar as aforesaid until on or.”

II.

It is ordered that that portion of the second paragraph of defendant’s affirmative defense to plaintiff’s first cause of action commencing with the word “the,” in the 15th line on page 4 of said paragraph, to the end of said paragraph may be stricken on the ground that the same is irrelevant and redundant matter. The portion of said paragraph stricken is as follows: [24]

“the defendant thereupon acting through its said physician and surgeon offered to furnish plaintiff board and lodging free and to give him daily massage treatment of the muscle for the purpose of relieving them of the alleged soreness and to continue this treatment and such other treatment as might be necessary until plaintiff was entirely relieved of said soreness; this offer plaintiff positively refused and thereupon demanded of defendant the sum of twenty-five hundred dollars and upon defendant refusing to pay said sum plaintiff departed from

Ellamar and refused to permit said physician and surgeon to treat him in any manner whatever."

III.

It is ordered that the entire fourth paragraph of defendant's affirmative defense to plaintiff's first cause of action be stricken on the ground that the same is irrelevant and redundant matter. Said paragraph so stricken is as follows:

"Defendant further alleges that it has at all times since said accident and now is able, ready and willing to compensate plaintiff in accordance with the provisions of Chapter 71 of the Session Laws of the Territory of Alaska for the year 1915, for any and all injuries he received by said accident or for any injury he now sustains of which the injuries received in said accident were the proximate cause."

IV.

It is ordered that that portion of the second paragraph of defendant's affirmative defense to plaintiff's second cause of action commencing with the word "in," in the second line, and ending with the word "injured," in the fourth line of said paragraph, be stricken on the ground that the same is irrelevant and redundant matter. The portion of said paragraph stricken is as follows:

"in order to better care for its employees who were slightly injured and to better administer first aid to those who might be seriously injured."

V.

It is ordered that that portion of the second paragraph of defendant's affirmative defense to plaintiff's second cause of action, commencing with the word "and," in fourth line from the end of said paragraph, be stricken on the ground that the same is irrelevant [25] and redundant matter. The portion of the said paragraph stricken is as follows:

"and shortly thereafter departed from Ellamar and defendant heard nothing of plaintiff and did not know of his whereabouts for more than two months thereafter."

VI.

It is ordered that that portion of the fifth paragraph of defendant's affirmative defense to plaintiff's second cause of action commencing with the word "and," in the fifth line from the end of said paragraph, be stricken on the ground that the same is irrelevant and redundant matter. The portion of said paragraph stricken is as follows:

"and thereupon demanded of defendant the sum of twenty-five hundred dollars and upon the defendant refusing to pay said sum plaintiff departed from Ellamar and refused to permit said physician and surgeon to treat him in any manner whatever."

To the above ruling of the Court the defendant then and there accepted and the exception was allowed by the Court.

IT IS FURTHER ORDERED BY THE COURT that all the remaining parts and portions of plaintiff's motion be and the same are hereby denied.

To which ruling of the Court the plaintiff then and there accepted and said exception was allowed by the Court.

CHARLES E. BUNNELL,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 30, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 11, page 92. [26]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONNY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation.

Defendant,

**Amended Answer to Plaintiff's Third Amended
Complaint.**

Comes now the above named defendant, and by leave of Court first had and obtained, files this its amended answer to plaintiff's third amended complaint, and admits, denies and alleges as follows:

I.

Referring to the first paragraph of plaintiff's first cause of action defendant admits the same.

II.

Referring to the second paragraph in plaintiff's

first cause of action defendant denies that in the accident therein described, or at all, plaintiff's right clavicle was fractured with separation limiting the motion of his right arm and shoulder or that his said clavicle was fractured or broken at all, or that the motion of his right arm or right shoulder was in any manner limited other than such as bruises of the flesh and muscles would cause; denies that the sight of his left eye was temporarily destroyed or destroyed at all or in any manner impaired; denies that his jaw was partially paralyzed or paralyzed at all and as to the other matters and things in said paragraph contained defendant admits the same.

III.

Referring to the third paragraph of plaintiff's first cause of action, defendant admits that plaintiff is about 33 years [27] of age and at the time of receiving said accident he was receiving from said defendant \$4 per day for his work, and as to each and every other allegation in said paragraph contained, defendant denies the same.

For a separate answer and by way of affirmative defense to plaintiff's first cause of action defendant alleges:

I.

The defendant admits that the plaintiff was in its employ on the 13th day of January, 1916, and on said day in the course of his employment, as a miner, met with an accident in which he received certain injuries consisting of bruises on his right shoulder, a bruise adjacent to his left eye and a bruise on his jaw but did not have his right clavicle broken; that

on or about the 8th day of February thereafter, the defendant caused said plaintiff to be thoroughly examined by a competent physician and surgeon authorized to practice medicine under the laws of Alaska, who after such examination informed said plaintiff and informed the officers of said defendant in charge of the defendants mining operations at Ellamar that said plaintiff was entirely recovered from said injuries; that from the time of said accident, to wit, the 13th day of January, 1916, until said examination, to wit, the 8th day of February, 1916, defendant furnished plaintiff with board and lodging and had his wounds properly dressed and cared for by a competent and experienced nurse; about the 15th day of April, 1916, at which time the defendant company received a letter from plaintiff's attorneys, Lyons & Ritchie, of Valdez, Alaska, stating that plaintiff claimed compensation for the injury received in said accident, whereupon, the defendant on the 22d day of April, 1916, notified said plaintiff through his said attorneys that said defendant then had in its employ at Ellamar, Alaska, a competent physician and surgeon authorized to practice medicine under the laws of the Territory [28] of Alaska and the said defendant requested plaintiff to immediately submit to an examination by said physician and surgeon for the purpose of ascertaining the extent of said alleged injuries, and then and there offered to provide plaintiff with free transportation and all expenses that plaintiff might be put to in going from Valdez to Ellamar and return; that said plaintiff absolutely refused to submit him-

self to such examination.

II.

That thereafter and on the 23d day of August, 1916, defendant again served upon plaintiff a written demand that he submit to an examination for the purpose of ascertaining the extent of his alleged injuries in words and figures, as follows, to wit:

“To Tony Possus of Valdez, Alaska, and Messrs.

Lyons & Ritchie, of Valdez, Alaska, His Attorneys:

Gentlemen:

In regard to your claim against the Ellamar Mining Company of Alaska for personal injuries, which you claim to have received while in the employ of this company, and which you claim resulted in the fracture of your clavicle, we call your attention to the fact that some time ago Ellamar Mining Company requested you to submit an X-ray examination of your shoulder for the purpose of ascertaining whether your clavicle was really fractured or not and that you have failed to do so. The Ellamar Mining Company of Alaska at this time informs you that it now maintains at Ellamar, Alaska, a first class hospital equipped with all modern surgical appliances, including an X-ray and has in attendance a first class physician and surgeon. The company now makes you the following offer: It will either take you in the company's launch or pay your transportation from Valdez, to Ellamar, at which place the Company's surgeon will make an X-ray examination of that portion of your clavicle you claim has been broken, and make a general and thorough physical examination of you,

and perform any necessary operation for the purpose of correcting and healing any fracture of your clavicle, if such exists, and will furnish you with first class hospital accommodations for the operation and until you are discharged as cured by the company's physician and surgeon. In other words it will furnish you with free transportation to Ellamar, hospital accommodations and physician and surgeon for an examination operation, if necessary, and until you have entirely recovered. The company will also settle such claims in cash as you may be entitled to during the time you have been disabled under the provisions of Chapter 71 of the Session Laws of the [29] Alaska Legislature of the year 1915. Please let the company know at an early date as possible whether you accept or reject this offer."

That shortly thereafter pursuant to the foregoing demand plaintiff did submit himself to an examination at Ellamar, Alaska, by the defendant's physician and surgeon who is authorized to practice medicine under the laws of the Territory of Alaska and an X-ray photograph taken of plaintiff's right clavicle disclosed that said right clavicle was not broken or fractured at the time of said examination, and plaintiff did not then claim that said clavicle was broken and used his right arm and shoulder freely and in such positions that had his right clavicle been broken it would have been impossible for him to have done so, but plaintiff did claim that his muscles about his clavicle and right arm were sore.

III.

Defendant alleges that plaintiff is not permanently injured in any degree whatever and is not suffering from any permanent disability whatever in any manner rising from the injuries received in said accident or of which the injuries received in said accident are the proximate cause; that the injuries received in said accident did not cause plaintiff a temporary disability for a period longer than three months and a half, which under the provision of Chapter 71 of the Session Laws of the Territory of Alaska, for the year 1915, would entitle plaintiff to the sum of two hundred and ten dollars, for which amount the defendant hereby tenders plaintiff judgment.

Referring to plaintiff's second cause of action contained in plaintiff's third amended complaint, defendant admits, denies and alleges as follows:

I.

Referring to the first paragraph of plaintiff's second cause of action defendant admits the same. [30]

II.

Referring to the second paragraph in plaintiff's second cause of action defendant denies that in the accident therein described, or at all, plaintiff's right clavicle was fractured with separation limiting the motion of his right arm and shoulder or that his said clavicle was fractured or broken at all, or that the motion of his right arm or right shoulder was in any manner limited other than such as bruises of the flesh and muscles would cause; denies that the sight

of his left eye was temporarily destroyed or destroyed at all or in any manner impaired; denies that his jaw was partially paralyzed or paralyzed at all, and as to the other matters and things in said paragraph contained defendant admits the same.

III.

Referring to the third paragraph of plaintiff's second cause of action defendant admits that plaintiff had been working in said mine for eight months prior to the date of said accident, and according to the rules of said mine the sum of \$1.50 per month was deducted from his wages for hospital dues, and defendant admits that at the time of the accident to plaintiff he was employed by defendant as a miner and was receiving \$4 per day for his work; defendant denies each and every other allegation in said paragraph contained except as the same is specifically admitted in the affirmative defense to plaintiff's said second cause of action.

IV.

Referring to the fourth paragraph of plaintiff's second cause of action defendant denies each and every allegation therein contained.

For a separate answer and by way of affirmative defense to plaintiff's second cause of action defendant alleges: [31]

I.

That at the time of said accident and for seven years prior thereto the defendant did not maintain a hospital at its mine at Ellamar, Alaska; that all the employees of said defendant including this plaintiff

well knew that said defendant did not maintain a hospital at its said mine, and did not have a physician and surgeon in attendance at said mine, but for many years prior to said accident and at the time of said accident it was the custom and rule of said defendant mining company to maintain at its mine at Ellamar certain medicines, liniments, bandages and other appliances for the purpose of giving first aid to injured employees and for treating slight injuries that any of its employees might receive; that in case of serious injuries to any of its employees it was the rule and custom of said defendant to send its employees who were seriously injured to Valdez or Cordova for treatment by physicians and surgeons who might be practising their profession at either of said places; plaintiff during all the time he was in defendant's employ at the time of said accident knew of this rule and custom and at the time, the sum of \$1.50 per month was deducted from his wages, knew of this rule and custom and knew that this would be the character and kind of medical aid and treatment he would receive should he meet with an accident while in defendant's employ.

II.

That at the time of said accident and for a short time prior thereto the defendant equipped a temporary hospital and employed a competent and experienced nurse, which said nurse was in attendance at the time of said accident. Immediately after said accident plaintiff was taken to said temporary hospital where his wounds and bruises were properly cleansed, medicated and bandaged and plaintiff re-

mained in said temporary hospital for a period [32] of three weeks, during all of which time said nurse was in attendance and properly medicated plaintiff's said wounds and bruises and properly cared for said plaintiff, and during all of said time plaintiff made no complaint of the attention he was receiving and did not state or in any manner intimate that he had any fractured bones as a result of said accident, and did not during any of said time demand or request of any of the officers of the defendant or of said nurse that he be examined or treated by physicians or surgeons. That on or about the 3d day of February, 1916, plaintiff, of his own volition and of his own desire, left said temporary hospital and took up his lodgings in the defendant company's bunk-house and took his meals regularly at the defendant company's dining-house. That thereafter on or about the 8th day of February, 1916, the defendant company caused said plaintiff to be examined by a competent and experienced physician and surgeon authorized to practise medicine under the laws of the Territory of Alaska, for the purpose of ascertaining if said plaintiff was then suffering from any injuries as the result of said accident; that said physician and surgeon thereupon made a careful and thorough examination of said plaintiff, and after completing said examination informed plaintiff and the officers of said defendant company that plaintiff had no broken or fractured bones and that he was not in any manner suffering from any injuries received in said accident and that there was no reason whatever why plaintiff should not immediately re-

sume work; that plaintiff at the time of said examination did not claim that his right clavicle was fractured or that the motion of his right arm and shoulder was in any manner limited and did not make any demands upon the defendant company or its officers for any further medical treatment or for any further services of a physician or surgeon.

III.

That on or about the 20th day of February, 1916, the defendant [33] established at Ellamar a complete hospital equipped with all modern surgical appliances including an X-ray, and employed a competent and experienced physician and surgeon who was authorized to practise medicine under the laws of the Territory of Alaska, and ever since said date has maintained said hospital and has had in attendance said physician and surgeon.

IV.

That on or about the 15th day of April, 1916, the defendant company received a letter from plaintiff's attorneys, Lyons & Ritchie, of Valdez, Alaska, in which it was stated that plaintiff claimed compensation for injuries he had received in said accident to which said letter the defendant, on the 22d day of April, 1916, made a written demand on plaintiff to submit himself to an examination, which said written demand was in words and figures as follows:

"Messrs. Lyons & Ritchie, Valdez, Alaska.

Gentlemen:

Mr. L. L. Middlekamp, for the Ellamar Mining Company of Alaska, has called our attention to your

letter to him of recent date in which you call to the attention of the company the claim of Tony Possus, or Tony Passiu, or Tony Passu, against it for compensation for an injury to the latter while in the employ of the Company at its mine at Ellamar, Alaska.

Mr. Middlekamp states that the company has a physician and surgeon in its employ at Ellamar, Alaska, authorized to practise medicine under the laws of the Territory of Alaska, and that the Company wishes to have an examination of the your client made by such physician. The Company, therefore, requests that he submit himself to examination by the Company's said physician at Ellamar, Alaska, forthwith, and the company will pay and advance to him upon demand at our office the necessary charges and expenses from Valdez to Ellamar and return, or will furnish such transportation. The Company of course cannot pay any transportation or any expenses whatsoever for any other surgeon or physician, who may desire, or whom Mr. Passos may desire to be present at such examination. If upon such examination it is found that Mr. Passos is suffering from any physical injury incurred in his employment at Ellamar, Alaska, the Company is willing to give proper treatment for such injuries. It is obviously impossible to make any settlement until such examination has been made as herein requested."

The plaintiff refused to submit himself to the [34] examination requested by the defendant and refused to go to Ellamar for the purpose of being examined

or treated by defendant's physician and surgeon.

V.

That thereafter and on the 23d day of August, 1916, defendant served upon plaintiff a written demand that he submit to an examination for the purpose of ascertaining the extent of his alleged injuries in words and figures, as follows, to wit.

"To Mr. Tony Possus, of Valdez, Alaska, and
Messrs. Lyons & Ritchie, of Valdez, Alaska, His
Attorneys:

Gentlemen:

In regard to your claim against the Ellamar Mining Company of Alaska for personal injuries, which you claim to have received while in the employ of this company, and which you claim resulted in the fracture of your clavicle we call your attention to the fact that sometime ago Ellamar Mining Company requested you to submit to an X-Ray examination of your shoulder for the purpose of ascertaining whether your clavicle was really fractured or not and that you have failed to do so.

The Ellamar Mining Company of Alaska at this time informs you that it now maintains at Ellamar, Alaska, a first class hospital, equipped with all modern surgical appliances, including an X-Ray, and has in attendance a first class physician and surgeon.

The Company now makes you the following offer. It will either take you in the company's launch or pay your transportation from Valdez to Ellamar, at which place the company's surgeon will make an

X-Ray examination of that portion of your clavicle you claim has been broken, and make a general and thorough physical examination of you, and perform any necessary operation for the purpose of correcting and healing any fracture of your clavicle, if such exists, and will furnish you with first class hospital accommodations for the operation and until you are discharged as cured by the company's physician and surgeon. In other words it will furnish you free transportation to Ellamar, hospital accommodations, and physician and surgeon for an examination, operation, if necessary, and until you have entirely recovered. The Company [35] will also settle such claims in cash as you may be entitled to during the time you have been disabled under the provisions of Chapter 71 of the Session Laws of the Alaska Legislature of the year 1915.

Please let the company know at an early date as possible whether you accept or reject this offer."

That shortly thereafter pursuant to the foregoing demand plaintiff did submit himself to examination at Ellamar, Alaska, by the defendant's physician and surgeon who is authorized to practise medicine under the laws of the Territory of Alaska and an X-ray photograph taken of plaintiff's right clavicle disclosed that said right clavicle was not broken or fractured at the time of said examination, and plaintiff did not then claim that said clavicle was broken and used his right arm and shoulder freely and in such position that had his right clavicle been broken it would have been impossible for him to have done so, but plaintiff did claim that his muscle about his

clavicle and right arm were sore; the defendant, thereupon, acting through his said physician and surgeon, offered to furnish plaintiff board and lodging free and to give him daily massage treatment of the muscles for the purpose of relieving them of the alleged soreness and to continue this treatment and such other treatment as might be necessary until plaintiff was entirely relieved of said soreness; this offer plaintiff positively refused.

WHEREFORE, defendant prays that plaintiff take nothing by reason of the matter and things set forth in said complaint other than a judgment for \$210 for temporary disability for a period of three months and a half.

DONOHOE & DIMOND,
Attorneys for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jan. 2, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [36]
United States of America,
Territory of Alaska,—ss.

T. J. Donohoe, being first duly sworn, deposes and says: That I am the agent appointed by the defendant company upon whom service of Summons might be made within the Territory of Alaska; that I make this verification on behalf of defendant company; that I have read the foregoing amended answer and know the contents thereof, and that the same is true as I verily believe.

T. J. DONOHOE.

Subscribed and sworn to before me this 2d day of Jan., 1917.

[Seal]

T. P. GERAGHTY,
Deputy Clerk, of the District Court, for the Territory of Alaska, Third Division.

I hereby accept service of the above and foregoing amended answer, by receiving a copy thereof, this 2d day of Jan., 1917.

LYONS & RITCHIE,
Attorneys for Plaintiff. [37]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant,

Reply.

Replying to defendant's answer to his first cause of action, plaintiff says:

I.

He denies that he was thoroughly examined by a competent physician and surgeon at Ellamar on February 8, 1916, or at any other time; he denies that defendant furnished him board and lodging until February 8, 1916, or at any time after he left defendant's alleged hospital about January 25, 1916;

denies that his wounds were properly dressed by a competent and experienced nurse, or at all, after leaving said hospital about January 25, 1916. He denies that he refused to submit to an examination by defendant's surgeon at any time but admits that he did refuse to go to Ellamar for such examination in April, 1916. He denies that when he was examined by defendant's surgeon at Ellamar in August, 1916, he used his right arm and shoulder freely, or that he so used either of them, or that he used either or both in positions that would have been impossible if his right clavicle had been broken. Plaintiff's knowledge of the English language is very imperfect, and he denies having any conversation with said physician at that time that was intelligible to himself. He denies that an X-ray taken at the time showed that his clavicle was not broken.

Answering defendant's answer to his second cause of action, plaintiff says:

II.

He denies any knowledge of defendant's hospital arrangements or system of caring for injured employees except in a casual way. He knew that defendant had a house equipped as a sort of crude hospital, with a woman in charge as nurse. He knew nothing of any further method of caring for injured employees and never had any conversation with any company official regarding the deduction of \$1.50 a month from his wages for hospital dues or what it would entitle [38] him to in case of his injury while in defendant's employ.

III.

Plaintiff denies all the allegations of paragraph II of defendant's affirmative defense to the second cause of action except so far as the same is admitted by his complaint.

IV.

Plaintiff denies that when he was examined by defendant's surgeon at Ellamar in August, 1916, an X-ray then and there taken showed that his right clavicle was not broken or fractured; denies that he then and there used his right arm and shoulder freely and in positions that would have been impossible if his clavicle had been broken. He alleges that by reason of his imperfect knowledge of the English language, such conversation as he had with defendant's surgeon was mainly unintelligible to him.

Wherefore plaintiff asks judgment as prayed for in his complaint.

LYONS and RITCHIE,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

Tony Possus, being duly sworn, says he is the plaintiff in this action; that he has heard read the foregoing reply and he believes the same to be true.

TONY POSSUS.

Subscribed and sworn to before me this 2d day of January, 1917.

[Seal]

JOHN LYONS,
Notary Public.

My commission expires November 27, 1920.

Service by delivery of copy admitted January 2, 1917.

Attorneys for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jan. 4, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [39]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Minutes of Court—Trial—January 4, 1917.

Now, on this day, this cause came on regularly for trial, Lyon & Ritchie appearing as attorneys for plaintiff, and Donohoe & Dimond appearing as attorneys for defendant; Whereupon the following proceedings were had and done, to wit:

WHEREUPON the member of the regular panel of petit jurors was excused, and the jury being incomplete, and the United States Marshal having returned a special Venire, issued January 2d, 1917, into court, the following were selected as jurors:

- | | |
|---------------------|---------------------|
| 1. J. D. Jefferson. | 7. K. E. Rudolph. |
| 2. Harry Whitley. | 8. Ed. Rucker. |
| 3. C. H. Kraemer. | 9. S. C. Wheeler. |
| 4. A. Von Gunther. | 10. L. F. Washburn. |
| 5. Rudolph Schmidt | 11. C. P. Topliffe. |
| 6. B. C. Wiltse. | 12. H. J. Mitchell. |

And the trial panel being complete and being accepted by both parties hereto, the jury was duly sworn to try the issues in this cause.

WHEREUPON opening statements were made by attorneys for the plaintiff and attorneys for defendant.

WHEREUPON Peter Seminoff was sworn to act as interpreter for Tony Possus, plaintiff herein.

WHEREUPON Tony Possus was sworn and testified in his own behalf.

WHEREUPON this being the hour of adjournment and the trial of this cause being incomplete, the further trial of this cause is continued to January 5th, 1917, at the hour of ten o'clock, A. M.

September 1916 Term—January 4th, 1917—81st Court Day—Thursday.

Entered Court Journal No. 11, page No. 97. [40]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Minutes of Court—Trial—January 5, 1917.

Now, on this day, this cause came on again regularly for trial, Lyon & Ritchie appearing as attorneys for plaintiff and Donohoe & Dimond appearing as attorneys for the defendant, and after roll-call of jurors, the following proceedings were had and done, to wit:

WHEREUPON Dr. F. M. Boyle was sworn and testified on behalf of plaintiff.

WHEREUPON Plaintiff Exhibit "A" was offered and admitted in evidence.

WHEREUPON Tony Possus was recalled and testified further in his own behalf.

WHEREUPON Dr. C. A. Winans was sworn and testified on behalf of plaintiff.

WHEREUPON the deposition of Dr. W. H. Chase was admitted and read in evidence.

WHEREUPON Plaintiff's Exhibit "B" was offered and admitted in evidence.

WHEREUPON Dan Atrick was sworn and testified on behalf of plaintiff.

WHEREUPON plaintiff rests.

WHEREUPON defendant moves the Court for an instructed verdict on plaintiff's second cause of action and after argument had and the Court being fully advised in the premises,—

IT IS ORDERED that said motion be, and the same is hereby denied, to which order and ruling of the Court defendant excepts and exception is allowed.

WHEREUPON defendant made a motion for nonsuit on plaintiff's [41] second cause of action and after argument had and the Court being fully advised in the premises,—

IT IS ORDERED that said motion be and the same is hereby denied, to which order and ruling of the Court defendant excepts and exception is allowed.

WHEREUPON L. L. Middelkamp was sworn and testified on behalf of defendant.

WHEREUPON Defendant's Exhibits Nos. 1 and 2 were offered and admitted in evidence.

WHEREUPON Mrs. S. A. Traumontien was sworn and testified on behalf of defendant.

WHEREUPON the deposition of Dr. B. F. Duckwall was admitted and read in evidence.

WHEREUPON this being the hour of adjournment, and the trial of this cause being still incomplete, IT IS ORDRED that the further trial of this cause be continued until Saturday, January 6th, 1917, at ten A. M.

September 1916 Term—January 5th, 1917—82d
Court Day—Friday.

Entered Court Journal No. 11, page No. 98. [42]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Minutes of Court—Trial—January 6, 1917.

Now, on this day, this cause came on again regularly for trial, Lyon & Ritchie appearing as attorneys for plaintiff and Donohoe & Dimond appearing as attorneys for defendant, and after roll-call of jurors, the following proceedings were had and done, to wit:

WHEREUPON Dr. E. C. Gross was sworn and testified on behalf of defendant.

WHEREUPON Defendant's Exhibits Nos. 3, 4 and 5, were offered and admitted in evidence.

WHEREUPON Dr. George Newlove was sworn and testified on behalf of defendant.

WHEREUPON H. W. Ells was sworn and testified on behalf of defendant.

WHEREUPON Dr. E. C. Gross was recalled and testified further on behalf of defendant.

WHEREUPON defendant rests.

WHEREUPON E. E. Ritchie was sworn and testified in rebuttal on behalf of plaintiff.

WHEREUPON argument was had by respective counsel and the jury being duly instructed by the Court as to the law in the premises, retire in charge of their sworn bailiffs for deliberation.

WHEREUPON court was adjourned until Monday, January 8th, 1917, except for the purpose of receiving the verdict in cause No. 857.

CHARLES E. BUNNELL,
Judge.

September 1916 Term—January 6th, 1917—83d Court Day—Saturday.

Entered Court Journal No. 11, page No. 100.
[43]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Transcript of Evidence.

BE IT REMEMBERED, that the above-entitled cause came on duly and regularly to be heard, at Valdez, Alaska, in the above-entitled court, on Thursday, the fourth day of January, 1917, at ten o'clock A. M. before Honorable CHARLES E. BUN-

NELL, Judge of the District Court for the Territory of Alaska, assigned to the Fourth Division, sitting in lieu of the presiding Judge of the Third Division by agreement of counsel, and Jury;

The plaintiff being represented by his attorneys and counsel, Messrs. Lyon & Ritchie:

The defendant corporation being represented by its attorneys and counsel, Messrs. Donohoe & Dimond and W. S. Bonnifield, Esq.:

The jury having been empaneled and sworn, opening statements were made to the Court and jury by Mr. Ritchie in behalf of the plaintiff and by Mr. Donohoe in behalf of the defendant corporation:

WHEREUPON the following additional proceedings were had and done, to wit: [44]

Testimony of Tony Possus, for Plaintiff.

TONY POSSUS, the plaintiff, called and sworn as a witness in his own behalf, testified as follows:

Direct Examination by Mr. RITCHIE.

(Examination through Interpreter PETER SEMINOFF—Russian and English.)

Q. What is your name? A. Tony Possus.

Q. Where do you reside? A. Valdez.

Q. What country are you a native of?

A. He is a Russian, Lutanian, that is on the Baltic coast, the northern part of Russia.

Q. That is one of the Baltic provinces?

A. Yes, sir, that is one of the Baltic provinces.

Q. How long have you lived in the United States?

A. Five years.

Q. How long have you lived in Alaska?

(Testimony of Tony Possus.)

A. Second year, going on my second year—two years.

Q. What is your business or occupation?

A. He works in the mines—mining.

Q. How long have you been a miner?

A. He says he worked in the mines for five years, three years in the states, working in the tunnels.

Q. Did you ever work in coal mines?

A. No. He wasn't working in coal mines.

Q. What kind of mines have you worked in?

A. Silver mines in the State of Utah,—Park City, Utah.

Q. Were you ever at Ellamar?

Mr. DONOHOE.—At this time the defendant desires to interpose an objection to any testimony whatever being received in this trial on either of the causes of action contained in Plaintiff's [46] Third Amended Complaint upon the ground that there are two causes of action improperly united in said complaint in this:

1. Plaintiff's first cause of action, as set forth in his third amended complaint, is an action *ex delicto*, having for its foundation an alleged tort of the defendant and plaintiff's said second cause of action is an action *ex contractu*, the foundation of which is an alleged breach of a hospital contract between plaintiff and defendant and the allegations contained in plaintiff's said second cause of action do not bring it within the rule that would permit the plaintiff to waive his contract and sue in tort, as he nowhere alleges malfeasance on the part of the defendant in

(Testimony of Tony Possus.)

connection with said hospital contract but does allege nonfeasance or failure on the part of defendant to perform its part of said contract.

2. Plaintiff's first cause of action as set forth in said third amended complaint is a special statutory proceeding, that is, a proceeding to recover compensation for an injured employee under the provisions of Chapter 71 of the Session Laws of the Territory of Alaska, for the year 1915, which is an act entitled, "An Act relating to the measure and recovery of compensation of injured employees in the mining industry of this Territory, and the compensation to designated beneficiaries where such injuries result in death, defining and regulating the liability of employers to their employees in connection with such industry, and repealing all acts and parts of acts in conflict with this act."

This act provides a special measure of damages to be ascertained by special rules and procedure and cannot be joined with a common law action as pleaded in plaintiff's said second cause of action, for the reason that the measure of damages and the rules of procedure governing the trial of said second cause [47] of action are entirely different from that of the said first cause of action.

3. Plaintiff in his first cause of action seeks to obtain compensation for his present permanent disability under the provisions of Chapter 71 of the Session Laws of the Territory of Alaska, for the year 1915, of which the accident occurring in the defendant's mine on the 12th day of January, 1916,

(Testimony of Tony Possus.)

was the proximate cause and he cannot join with such an action his second cause of action in which he seeks to recover damages for a portion of his present alleged injuries, for the reason that his entire injuries growing out of said accident and of which said accident is the proximate cause will be fully compensated in his first cause of action.

Further, the defendant demurs to plaintiff's second cause of action set forth in plaintiff's third amended complaint on the ground that there is another cause of action pending between the plaintiff and defendant for the same cause set forth in the said second cause of action, to wit: Plaintiff's first cause of action. In this cause of action plaintiff seeks to recover damages and compensation for an injury received by him in the course of his employment as a miner in the employ of the defendant and under the terms of said Chapter 71 of the Session Laws of Alaska, for the year 1915, he is entitled to be compensated for any defects he has sustained and now has, of which the original injury was the proximate cause and it is immaterial whether his alleged permanent injury was enhanced or aggravated by the lack of proper hospital treatment or not. The defendant in the first cause of action will be required to compensate the plaintiff for all injury he now sustains which grew out of the original injury set forth in said first cause of action. To permit the plaintiff to maintain his second [48] cause of action would be to compel the defendant to answer the same charge twice and compel the defendant to answer

(Testimony of Tony Possus.)

twice in damages for the same cause of action.

And further, defendant demurs to plaintiff's second cause of action contained in plaintiff's said third amended complaint on the ground that it does not state facts sufficient to constitute a cause of action in favor of plaintiff and against defendant.

These are the same grounds I had in the demurrer and in order to preserve the record, I desire to make this objection at this time as a demurrer to the entire evidence.

By the COURT.—The objection is overruled and exception allowed.

Mr. DONOHOE.—Now, I move the Court for an order requiring the plaintiff to elect on which of his two causes of action he now seeks to recover, on the theory that both causes of action are for the same thing and cannot be separated.

By the COURT.—Which motion is denied and exception allowed.

(Last question read as follows:)

Q. Were you ever at Ellamar? A. Yes.

Q. Did you ever work in the Ellamar mine?

A. Yes, sir, he was working in Ellamar.

Q. That is, the mine of the Ellamar Mining Company of Alaska?

A. Yes, sir—he was working at the mine of the Ellamar Mining Company at Ellamar, Alaska.

Q. When did you first work there? When did you begin working there?

A. He says he worked there eight months; he

(Testimony of Tony Possus.)

started early in the spring and worked until January.

Q. Started in the spring of 1915?

A. Yes, 1915, the spring of 1915.

Q. And worked until what time?

A. Until January, 1916, the 12th of January, 1916. [49]

Q. Were you working steadily all that time?

A. He was slightly injured at one time, some time past and he lost three days, a slight injury in his leg.

Q. What work did you do in the Ellamar mine?

A. He was a machine man.

Q. Just explain what you mean by a machine man?

A. He was running the machine.

Q. Ask him about it.

A. The first time he started on a small machine called a stoper, the machine was small; the big machines they use in the drifts; he worked at it the first time and twenty days at the big machine in the stope.

Q. What is the machine for? What does he mean by that? What work does the machine drill do in the mine?

A. He said they use the machines for breaking the ore.

Q. Were you working in the Ellamar mine for this company on the 12th of January, 1916, a year ago?

A. Yes, sir, he was working there the 12th of January.

Q. What shift were you on?

A. He said they were working at night shift that

(Testimony of Tony Possus.)

time,—they were changing the shifts every two weeks he says, or every month, I don't know.

Q. Did you do anything that night except work on the machine drill?

A. He said he was ordered by the shift boss to go and load some waste, where he was working on the machine before.

Q. Was this waste in the same part of the mine or some distance away?

A. He says some distance away, probably six or seven hundred feet or 900 feet, he don't remember.

Q. Who was the shift boss?

A. Oscar Johnson was the shift boss. [50]

Q. Where is Oscar Johnson now?

Mr. DONOHOE.—We object to that on the ground that it has no bearing on this case.

Objection overruled. Defendant allowed an exception.

A. He got killed.

Mr. DONOHOE.—We admit that Oscar Johnson is not down at that place now and is not here and we move that the answer be stricken.

Motion denied; defendant allowed an exception.

Q. How did you go to get to the waste work where you were ordered to go?

A. He said they call the 100 raise the same place they were working before,—it is 100 they call it.

Q. Did the boss tell him how to get to the other part of the mine—if so, what did he tell him to do?

A. He says he was ordered by the shift boss to go on and load the waste on the car.

(Testimony of Tony Possus.)

Q. How was he ordered to go there? How did the boss tell him to go, to walk or to ride or fly or what?

Mr. DONOHOE.—I object to this question on the ground that it is incompetent, irrelevant and immaterial. We have admitted everything they pleaded on that question, that he was sent by Oscar Johnson and how he went there. In our admissions to paragraph 2 of the first cause of action we admit all that.

Objection overruled; defendant allowed an exception.

Mr. DONOHOE.—I am willing for you to take your pleading and read it.

Mr. RITCHIE.—All right. Do you object to my reading this paragraph down to that point (handing paper to counsel).

Mr. DONOHOE.—No.

Mr. RITCHIE.—This is admitted to be the facts in the case by both sides:

“On or about January 12, 1916, and for about eight months [51] prior thereto plaintiff was in the employ of defendant as a miner, usually engaged in operating a machine drill. On the date named plaintiff was working on the night shift on the 100 foot level of said company’s mine. At about eight o’clock P. M. he and another miner named Louis —, who was working with him, were ordered by the shift boss, Oscar Johnson, to leave their work and go to another part of the mine to assist in removing a slide that had just fallen. In order to reach the slide they were directed by said shift boss to ride upon a car down a track which ran to the

(Testimony of Tony Possus.)

glory-hole about 1000 feet distant. Plaintiff and said Louis mounted said car and started the same down the track, plaintiff riding in front. At the end of the track the car ran against a rock wall at the edge of the glory-hole. In the contact of the car with said wall plaintiff was pinned under the car and sustained the following injuries:

By the COURT.—You understand, gentlemen, that both counsel for the plaintiff and counsel for the defendant admit what Mr. Ritchie has just read as being true and it is to be considered by you as evidence.

Q. What caused the car to strike that rock wall?

Mr. DONOHOE.—We object to that as incompetent, irrelevant and immaterial—we admit he did strike the wall and got injured.

By the COURT.—In view of the pleadings and the admission, the objection is sustained.

Plaintiff allowed an exception to the ruling.

Mr. RITCHIE.—In order to save the record, we desire to make an offer to prove by this witness—

Mr. DONOHOE.—I insist on the jury being dismissed before that is done, or that it be reduced to writing.

(Whereupon, without the hearing of the jury, in the presence of counsel and the Court, the following proceedings were had:)

Mr. RITCHIE.—We offer to prove by the testimony of plaintiff that the cause of the contact of the car with the rock wall in said mine, resulting in the injury to plaintiff as set out in plaintiff's first cause

(Testimony of Tony Possus.)

of action was due to a defective brake on said car, causing the same to become uncontrollable and to run away at great speed. [52]

By the COURT.—The offer to prove will be denied and exception allowed plaintiff.

Q. Now, when the car struck the rock wall, what happened, if any thing?

A. He says he was pinned under the car and lost his consciousness and he don't remember anything more.

Q. Tell what happened when you first recovered consciousness.

A. He said he regained his consciousness when he was hoisted on top.

Q. Where were you when you recovered consciousness? A. He said he was on top.

Q. Outside of the mine?

A. He said in the hoist-room.

Q. Had he been taken away from the car at that time?

A. Yes, sir, he was taken out from the car.

Q. When you were on the car, where were you riding, on which end of the car?

A. He said the front end of the car.

Q. Do you know just how you struck?

A. He says he was struck with the car against a wall and he lost his consciousness.

Q. Did it happen very suddenly?

A. He says it happened very quick, he don't remember—he didn't have a chance to jump, he says.

Mr. DONOHUE.—We object to this line of testi-

(Testimony of Tony Possus.)

mony—it has already been ruled on.

Objection sustained; plaintiff allowed an exception.

Q. After you recovered consciousness, where did you go or where were you taken?

A. He was taken down to the hospital.

Q. What injuries did he suffer? Tell him to describe his injuries or hurts.

A. He says he was hurt in his shoulder. [53]

Q. Tell him to describe that. To take each of his injuries, one at a time and have him tell about it.

A. He says he got hurt in his shoulder.

Q. Does he know anything more about it than that?

A. He says he broke it—it hurt him in the jaw and broke his two teeth, he says.

Q. What was the result of his injury to his shoulder—does it affect his ability to use it, in any way?

A. He says he is unable to work after he got hurt in his shoulder.

Q. Has he been able to work at any time since?

A. He says, no, he was not able to work since the injury.

Q. Can he use his right arm and shoulder in lifting?

A. He says, no, he can't lift anything with the right arm.

Q. Can you handle any kind of tool that requires muscular exertion with the right arm and shoulder?

A. He says he is not able to use his right arm yet.

(Testimony of Tony Possus.)

Q. Show the jury how high you can lift your right arm.

(Witness does so.)

Q. Can you lift it any higher than that?

A. No—he says he can't lift it any higher. He says he can just swing it that far.

Q. Is there any injury to your arm below the shoulder?

A. He says not below the shoulder, just underneath here—there is some pain here.

Q. What other injury did he suffer?

A. He says over here, over the eye and his jaw and teeth.

Q. What injury was inflicted upon his eye?

A. He said he got a bruise over his eyes—it was bruised and shattered.

Q. Over which eye? A. The left eye.

Q. What result did that leave, if any? [54]

A. He says at the present time he can see, it is all right but at the time it was hurt, it affected his eyesight.

Q. For how long? A. Just about a month.

Q. How much did it affect his eyesight,—could he see at all?

A. He says he was able to see, but it was poor light.

Q. What injury was there to the jaw that he referred to a while ago?

A. He says two teeth were knocked out.

Q. Which side of the jaw?

A. Upper side, on the left side.

(Testimony of Tony Possus.)

Q. You say two teeth were knocked out or broken?

A. He says there was two teeth knocked out.

Q. What else, if anything?

A. He says that was all.

Q. What was the effect of this bruise on the jaw, if any?

A. He says he wasn't able to eat for a long time.

Q. Why wasn't he?

A. He says he couldn't open his jaw because it was so sore. He couldn't open it to even eat, just to drink soup or something.

Q. How wide could he open his mouth the first day or two after he was hurt?

A. He says just about an inch he could open his jaw.

Q. How long did that condition continue? How long was it before his jaw began to get better so he could open his mouth wider?

A. He says over forty days, or a month and a half or so.

Q. How long did he suffer any pain or handicap in the use of his jaw?

Mr. DONOHOE.—We object to that question at this time on the ground that if the evidence is applied to the first cause of action it is incompetent, irrelevant and immaterial and I would like at this time to find out what would be the theory of the Court in trying this case, whether the first cause of action [55] may be proven first and then the second or whether the evidence will be intermingled in the two

(Testimony of Tony Possus.)

causes of action—I am at a loss to know how to proceed on it.

The COURT.—Of course counsel will present the questions directed toward the first cause of action first but I anticipate that some of the questions which would be presented would also apply to the second cause of action. The objection will be overruled and defendant allowed an exception.

(Last question read by reporter as follows:)

Q. How long did he suffer any pain or handicap in the use of his jaw?

A. He said he wasn't able to eat very much for forty days.

Q. How long was it before he entirely recovered the use of his jaw?

A. He says after two months after his injury he was able to eat well.

Mr. RITCHIE.—I believe it is admitted he was taken to the building used as a hospital by the Ellamar Mining Company at that time.

Mr. DONOHOE.—I think so. We will admit that the plaintiff was taken to the temporary hospital, used as a hospital by the Ellamar Mining Company, if we haven't already admitted it.

Q. Did anybody have the care of you after you were taken to the hospital?

A. Mrs. Tramontin, the nurse.

Q. What, if anything, did Mrs. Tramontin do for you?

A. He says she put a plaster on his shoulder and a bandage on.

(Testimony of Tony Possus.)

Q. Anything else?

A. He says she bandaged up his cut over the eye and that is all.

Q. Just describe how she bandaged you—just indicate how and where the bandages were placed.

Mr. DONOHUE.—We object to any testimony being offered at this time in any manner tending to prove the allegations of plaintiff's second cause of action on the ground that the complaint, so far [56] as that action is concerned, does not state facts sufficient to constitute a cause of action, and on the further ground that it commingles the two causes of action together in such a manner that the jury will not be able to determine one from the other any degree of certainty or definiteness.

Objection overruled; defendant allowed an exception.

A. Right close to the shoulder.

Q. What kind of a bandage?

Mr. DONOHUE.—We make the same objection.

Objection overruled; defendant allowed an exception.

A. With a thin bandage,—a thin bandage.

Q. Did she put anything else on besides the bandage?

Mr. DONOHUE.—We object to that as leading.

Objection overruled; defendant allowed an exception.

A. He says she put some medicine in his bruise.

Q. How long did she leave the bandage on you?

A. It was taken off the next day.

(Testimony of Tony Possus.)

Q. Did she put any other bandage on?

A. Just a plaster was left.

Q. How long did that remain on?

A. He says it was taken off the very next day after the second.

Q. Was there anything else placed on him then, after that?

A. He says some liquid, something in liquid form, was put on his shoulder—some medicine in liquid form.

Q. Tell him to describe that plaster—how much of his body or shoulder did that cover?

Mr. DONOHOE.—I have an objection and exception to all this line of testimony?

The COURT.—Yes, sir.

A. He says not over six inches wide, square.

Q. After she took the plaster off, what was the appearance of [57] your shoulder?

A. He says his shoulder was black.

Q. How much of it? How much of his shoulder was black?

A. He says there was a big black bruise on his shoulder.

Q. Did it remain in normal condition as to size?

A. He says there was a big swelling in it.

Q. How long did it remain black or discolored?

A. He says about twenty-five days.

Q. How long was there any swelling there?

A. He says the swelling was about 18 or 20 days—he doesn't remember exactly how long the swelling was on his shoulder.

(Testimony of Tony Possus.)

Q. How long did you remain there in the hospital?

A. Fourteen days.

Q. Why did you leave the hospital?

A. He was ordered by Mr. Gedney to leave the hospital.

Q. Who is Mr. Gedney?

A. He says he is foreman.

Q. Did anybody connected with the company, that is, any officer of the company, come to see you at any time after you went into the hospital?

Mr. DONOHOE.—We object to that question on the ground that it is incompetent, irrelevant and immaterial. It has been ruled out in the pleadings, that paragraph regarding the attempts to get a release from this man, and we object to its being testified to at this time because it is not within the pleadings.

By the COURT.—He may answer; the objection will be overruled.

Defendant allowed an exception to the ruling.

A. He didn't understand the question.

(Question read as follows:)

Q. Did anybody connected with the company, that is, any officer of the company, come to see you at any time after you went into [58] the hospital?

A. He says nobody was seeing him at all.

Q. Do you know who had charge of the work there generally, at that time? A. Mr. Estey.

Q. Who is Mr. Estey?

A. He was a bookkeeper up there.

Q. Was Mr. Middlecamp there at that time?

(Testimony of Tony Possus.)

A. He says, no, he was not there.

Q. He was not in Ellamar at that time?

A. No, he says he was not in Ellamar.

Q. And was Mr. Estey in general charge of the work?

A. He says he was in charge of the mine at that time.

Q. Did Mr. Estey ever come to the hospital to see you?

A. He saw him the next day after he got hurt.

Q. Tell him to answer the question—Did Mr. Estey ever come to the hospital to see him? He can answer that Yes or No.

A. He says he came to see him the next day.

Q. What did Mr. Estey say, if anything?

Mr. DONOHOE.—We object to that question on the ground that it is incompetent, irrelevant and immaterial and not within the issues joined by the pleadings.

Mr. RITCHIE.—We maintain it is admissible to support the second cause of action, showing the attitude of the company toward this plaintiff from the time of the accident until the present time and is part of the *res gestae*.

By the COURT.—Mr. Interpreter, did you give the entire answer to the last question?

The INTERPRETER.—Yes, your Honor, I did.

The COURT.—That was all his answer?

The INTERPRETER.—Yes. [59]

By the COURT.—He may answer the question.

(Testimony of Tony Possus.)

The objection will be overruled and defendant allowed an exception.

A. When he came to see him, he brought a paper to sign to him.

Q. What did he say about that paper?

Same objection; objection overruled; defendant allowed an exception.

A. He said Mr. Estey said to him, you sign this paper—if you sign this paper you get your half pay; if you don't sign, we are going to throw you out the next day.

Q. Did he tell him what was in the paper? If so, what?

Mr. DONOHOE.—We make the same objection.

The COURT.—The objection will be sustained to that question.

Plaintiff allowed an exception to the ruling.

Q. Did Mr. Estey come back afterwards at any time to the hospital?

Same objection; objection overruled; defendant allowed an exception.

A. He was at the hospital four days afterwards.

Q. What did he say, if anything, then?

Same objection; objection overruled; defendant allowed an exception.

A. He says Mr. Estey was not talking to him at all, he was talking to Mrs. Tramontin and was asking how many stitches he has in his cut over his eye.

Q. Did Mr. Estey come at any time after that?

(Testimony of Tony Possus.)

Same objection; objection overruled; defendant allowed an exception.

A. He was not there any more.

Q. Did Mr. Gedney ever come to the hospital?

A. Mr. Gedney was in the hospital too, he came to see him.

Q. When did he first come to the hospital?

A. He says that Mr. Gedney was there at the same time that Mr. Estey brings that paper to sign. [60]

Q. Did he come there at any time afterward?

Mr. DONOHOE.—We object to that question on the ground that it is incompetent, irrelevant and immaterial and on the further ground that it is shown by the plaintiff's testimony that Mr. Gedney had no power to bind the defendant company in any manner whatever. He has already testified that Mr. Estey was in full command of the affairs there during the time of this accident.

Objection overruled; defendant allowed an exception.

A. He says he was there a couple of days afterwards, him and the shift boss—Mr. Gedney and the shift boss.

Q. What did Mr. Gedney say, if anything, at that time?

Mr. DONOHOE.—We object to that on the grounds set forth in our last objection.

Objection sustained; plaintiff allowed an exception to the ruling.

Q. Did Mr. Gedney come back at any other time after that?

(Testimony of Tony Possus.)

A. He says he was to see him one day afterwards, after that.

Q. How did you come to leave the hospital?

A. He says Mr. Gedney come and ordered him out.

Mr. DONOHOE.—We move to strike out anything said by Mr. Gedney.

By the COURT.—He has already testified that he left the hospital at the order of Mr. Gedney and he may testify as to what Mr. Gedney said at the time he left the hospital. Motion denied.

Defendant allowed an exception to the ruling.

Q. State what Mr. Gedney said, if anything, when he left the hospital.

A. Mr. Gedney said, you better go to the bunk-house because nobody is going to wait on you here—you are able to go yourself.

Q. Now, what did Mrs. Tramontin tell him, if anything, about his [61] injuries, when she first took charge of him?

Mr. DONOHOE.—We object to that question on the ground that there is no proper foundation laid to bind this company in any manner or in any form by what Mrs. Tramontin might have said or might not have said.

Mr. RITCHIE.—I will withdraw the question.

Q. After you left the hospital, where did you go?

A. He says he went to the bunk-house, the company's bunk-house.

Q. What did you do there?

A. He says he wasn't doing anything, just lying there in the bed.

(Testimony of Tony Possus.)

Q. How long did you remain in the bunk-house?

A. Fourteen days.

Q. How long did you remain in the bunk-house did you say?

A. Fourteen days he was lying in the bunk-house.

Q. How did you live during that time, that is, where did you get your meals and how?

A. He says two days nobody was bringing him meals and the third day some of his friends bring his meals.

Q. After that how did he get his meals?

A. Three times some of his friends were bringing his meals and after that he went to his meals himself.

Q. To the company boarding-house?

A. Yes, sir, the company's boarding-house.

Q. To what extent could you use your jaw at that time in eating?

A. He says he only could eat just the soup.

Q. Could he eat anything more than that as long as he remained in the bunk-house?

A. He says anything in liquid form, coffee or tea—he says he dissolved cake in the coffee and drank that.

Q. Why did you leave the bunk-house?

Mr. DONOHOE.—We object to that as incompetent, irrelevant and immaterial [62] and not within the issues joined by the pleadings. Objection overruled; defendant allowed an exception.

A. He was ordered by Mr. Estey to go to work—if he don't go to work he had to move, roll his bed and move out altogether from the bunk-house.

(Testimony of Tony Possus.)

Q. What did he do then?

A. He says he had twelve days' time coming that time and he wants his time.

Q. That was in the conversation with Mr. Estey, was it—that was before he left or after he left the bunk-house?

A. That was before he left the bunk-house—he says the time he was ordered to leave the bunk-house.

Q. What did he do when he was ordered to leave the bunk-house?

A. Some of his friends rolled his bed and he then went down to Jim Fielder's place, down at Ellamar.

Q. How long did he stay there?

A. Four days.

Q. And then what did he do?

A. He was waiting for the boat to come to Valdez.

Q. Did he leave Ellamar or stay there?

A. He says he left Ellamar.

Q. Where did he go from Ellamar?

A. He came to Valdez.

Q. Where have you been since then? Where has he been since?

A. When he came to Valdez he stopped at Mr. Conley's place.

Q. He has been in Valdez since, has he?

A. Yes, sir, he was living ever since in Valdez.

Q. Ask him if he remembers what date he got here in Valdez?

A. He says he don't remember the date, what date

(Testimony of Tony Possus.)

it was when he came to Valdez.

Q. How old are you, Tony? [63]

A. 34 years of age.

Q. Now? A. Yes, sir.

Q. Have you any family?

A. He has just got a mother.

Q. He is not a married man?

A. No, he is not married.

Q. Is your father living? A. Father died.

Q. Where is your mother?

A. His mother is in the old country.

Q. Have you given or sent anything to your mother for her support of late years?

Mr. DONOHOE.—We object as leading.

The COURT.—It is leading but he may answer the question.

Mr. DONOHOE.—We also object on the ground that the question is too indefinite; he says, has he given her or sent her anything within the last few years; that doesn't bring it within the scope of my understanding of the law.

Mr. RITCHIE.—I can't cover it all at once.

By the COURT.—I presume counsel will cover that by further questions. Tell him to answer yes or no, whether he has given his mother anything since he came to America for her support. Defendant allowed an exception to the ruling.

A. He says, yes, he was sending money.

Q. How much has he sent to her since he came to America? A. \$550.

(Testimony of Tony Possus.)

Q. Has his mother any property of her own or any means of livelihood?

A. He says, no, she has no property.

Q. How old is she? [64] A. About 65 years.

Q. When did you last send her money?

A. He says he sent some money before he started to work at the Ellamar mine. He says he sent some money from Salt Lake City but the time the war started the money came back, some fifty dollars came back.

Q. That was before he came to Ellamar?

A. That was before he came to Ellamar.

Mr. RITCHIE.—I believe it is admitted he was earning four dollars a day?

Mr. DONOHOE.—Yes, sir.

Q. How long have you worked as a drill man?

A. He says he worked eight months in Ellamar.

Q. I mean altogether? A. For three years.

Q. Did he draw as high wages as anybody for that work?

Mr. DONOHOE.—We object as incompetent, irrelevant and immaterial—they plead he was getting four dollars a day at the time of the accident and we admit it.

Mr. RITCHIE.—We plead he was able to draw the highest wages paid for that kind of work.

The COURT.—It being shown he was working there and admitted he was running a machine drill and was getting four dollars a day, it seems to me that covers it. Objection sustained. Plaintiff allowed an exception.

(Testimony of Tony Possus.)

Q. Have you suffered any pain from your injuries?

Mr. DONOHOE.—We object to that question on the ground that it is incompetent, irrelevant and immaterial. So far as the first cause of action is concerned, it doesn't matter whether he suffered pain or not; if directed to the second cause of action, the two actions are so intermingled that it would be impossible. [65] for the jury with any degree of certainty to determine what portion of this pain and suffering would apply to the one cause and what would apply to the alleged other cause.

Objection overruled; defendant allowed an exception.

A. He says he pains occasionally now yet from the injury.

Q. Where does he suffer pain?

Same objection; overruled; defendant allowed an exception.

A. He says right in his shoulder is the pain and he says occasionally he has pains in his head.

Q. Has he suffered pain continuously in his shoulder or only from time to time?

Same objection; objection overruled; defendant allowed an exception to the ruling.

A. He says he doesn't have no pain when he doesn't use his arm or move his arm, but when he moves the arm, then he has got a pain in his shoulder.

Q. Have you tried recently to use your arm and shoulder in any kind of work?

(Testimony of Tony Possus.)

A. He says, no, he didn't try—it is always painful to lift his arm and his arm pains yet.

Q. During the first few weeks after this injury, did you suffer much pain or only a little?

Same objection; objection overruled; defendant allowed an exception to the ruling.

A. At first when he got hurt he has a strong pain in his shoulder—he is not able to put his coat on or nothing.

Mr. RITCHIE.—That is all at this time. [66]

Cross-examination by Mr. DONOHUE.

Q. What part of Russia did you come from?

A. Lebau, Russia.

Q. What occupation was he engaged in when he lived in Russia?

A. He says he was a laborer in Russia, just a laborer.

Q. Where did he first land in America and when?

A. He says he arrives in the city of New York.

Q. When? A. Five years ago.

Q. Where did he first go to work?

A. He says he went to work in the first place in the Gunnison Tunnel, Colorado.

Q. How long did he work there?

A. Four months and a half.

Q. What kind of work was he doing there?

A. He was working on concrete work.

Q. Was he an ordinary laborer at that work?

A. Yes.

Q. Where did you next go to work?

(Testimony of Tony Possus.)

A. Strubble tunnel.

Q. When and where did you first become engaged in mining?

A. In Park City, Utah, the Dilly Judge Mine, three years ago.

Q. How long did you work in that mine?

A. Nine months and a half.

Q. Did you have any accident in that mine?

A. No, there was no accident in it.

Q. You were not injured in any accident in that mine?

A. No, he was not injured in that mine at all.

Q. What mine did you next work in?

A. He was at Midway, Utah, the Snake River tunnel.

Q. How long did you work there? [67]

A. About fifteen months, he says.

Q. Did you receive any injuries in that work?

A. No, he says he was not injured at that time.

Q. When did you first come to Alaska?

A. He says about two years ago, something like that—he says next spring will be two years when he first arrived in Alaska—he don't remember the month exactly.

Q. What mine did you first work in in Alaska?

A. He says the first mine he worked in in Alaska was the Ellamar mine.

Q. Now, what work were you engaged in between the time you first landed in Alaska and the time you went to work in the Ellamar mine, for the Ellamar Mining Company?

(Testimony of Tony Possus.)

A. He says he wasn't working nowhere except he was waiting fifteen days for the work there at Ellamar—the first place he worked was Ellamar.

Q. When did you last hear from your mother, receive a letter from her?

A. It is two years ago since he had the last word from his mother.

Q. Two years ago? A. Yes.

Q. And you don't know at this time whether your mother is living or not, do you?

A. He says he don't know if his mother is living or not now on account of the war.

Q. You don't know whether your mother was living on the 12th day of January, 1916, the date of the accident, do you?

A. He says he don't know whether his mother was alive on the day he got hurt or not.

Q. You didn't send any money to your mother during all the time you were working in Ellamar, did you? [68]

A. He says he wasn't sending any money from Ellamar, wasn't sending her any money from Ellamar—he says on account of the war the money came back to him.

Q. Is it not a fact that the other Russian boys or men that were working at Ellamar, were sending money to their folks in the old country during the time you were working there?

Mr. RITCHIE.—We object to that as irrelevant and immaterial.

(Testimony of Tony Possus.)

Objection sustained; defendant allowed an exception to the ruling.

Q. How do you know that you couldn't have sent money to your mother if you cared to?

A. He says the place where he was living, that place is occupied by Germany now, near Dwinsk, thirty miles from Dwinsk—that place is occupied by Germany and he couldn't send it there, because he don't know whether his mother is living there—all the people left the country.

Q. Is it not a fact when you last heard from your mother she was living with either your brother or sister in the old country?

A. He says his mother lived with his sister before—his sister was not married; he says his sister and him is not married, he says she is single.

Q. Have you that letter you received from your mother two years ago?

A. He says he hasn't got it now, he lost it or something.

Q. What is his answer?

A. He says he hasn't got the letter, he lost it.

The COURT.—Did he say he lost it?

A. Yes, sir.

Q. Where did you send this \$500 from that you spoke of?

A. He says he was sending his money from Park City, Utah, from Gunnison Tunnel and Strubble Tunnel, where he was working—he was sending money from three places. [69]

Q. Is it not a fact that that money you sent back

(Testimony of Tony Possus.)

was sent to pay your passage out to America and not for the support of your mother?

A. He says the money he is sending for his mother, not to pay passage to America.

Q. Who advanced you the money to pay your passage to America?

A. He says the money was given him by his brother.

Q. By his brother?

A. Yes, his brother—he was sending him \$300 from Colorado to pay his passage to America.

Q. When did you first send money to your mother?

A. He says he sent money to his mother from Gunnison Tunnel, the first place he was working.

Q. And where was he when he sent the last money?

A. He says the last time he sent it from Park City, Utah—no, Salt Lake City.

Q. When was that?

A. He says just before he started to Alaska. It was a short time before he started to Alaska; it will be two years in the spring when he sent the money last to his mother.

Q. That money was not delivered to your mother but returned to you, was it?

A. That money was sent to him back, by the agent.

Q. Who was the agent—where was he?

A. In Chicago, Illinois.

Q. In Chicago? A. Yes.

(Testimony of Tony Possus.)

Q. What month was that and what year when he sent that money? A. He says 1914.

Q. When did you last send money, previous to that, to your mother? [70]

A. Park City, Utah, he sent money previous to that.

Q. When? What date? What month and what year?

A. He says he don't remember, he was sending her money right along in 1913 and 1914.

Q. You never sent your mother any money after 1914?

A. No, he wasn't sending any more since the money came back to him from Chicago.

Q. And you don't know whether your mother is alive or not?

A. He says that place is occupied by Germany and he don't know if his mother is sent out to some different province and he don't know the address where his mother lives—perhaps his mother is alive or dead, he don't know he says.

Q. When you were taken to the temporary hospital of the defendant company at Ellamar, after this accident occurred on the 12th day of January, 1916, didn't the nurse there dress your wounds and bandage you up and take care of you?

A. He says he was bandaged up the same day he was brought up to that hospital by the nurse who was in charge there.

Q. Is it not a fact that the nurse took six or seven stitches in the cut over your left eye?

(Testimony of Tony Possus.)

A. He says yes.

Q. Now, she treated that wound all right, didn't she?

Mr. RITCHIE.—We object, as calling for a conclusion.

Objection sustained; defendant allowed an exception.

Q. Did you make any complaint to the nurse or the officers of the company that you were not getting proper treatment in the hospital at Ellamar?

A. He says no.

Q. Now, was there any bruise on your left jaw when you were taken to the hospital after the accident?

A. He says there was a mark on his cheek. [71]

Q. Was it a cut, so it was bleeding?

A. Yes; it was a cut.

Q. How much of a cut?

A. He says over the eye.

Q. I mean his jaw, where the teeth were broken—was there any cut on the outside there?

A. He says just a swelling, that is all.

Q. Just a swelling? A. Yes, sir.

Q. Did you tell the nurse that you had a couple of teeth broken out? A. Yes, sir.

Q. Now, in regard to your ability to use your jaw, while in the hospital—is it not a fact that you ate beefsteak the third day you were there?

A. He says no.

Q. How did you get your meals while in the hospital? A. It was brought to him by the cook.

(Testimony of Tony Possus.)

Q. From the messhouse?

A. From the messhouse, yes.

Q. Did you get your meals regularly, three times a day? A. Yes, sir; three times a day.

Q. You say that all the time you were in the hospital, you couldn't eat anything but soup, is that right? A. Yes, that is all.

Q. Couldn't eat any fruit while you were in the hospital—you didn't have fruit?

A. He says no—he says fruit was brought to him, but he wasn't eating it.

Q. How long did the nurse leave those bandages on? A. It was taken away the next day.

Q. And was another bandage placed on the next day? [72] A. Just the plaster was left.

Q. Then after the first day, the nurse had no bandage on you at all—is that correct?

A. No, sir.

Q. That is correct? A. Yes, sir.

Q. Did you notify the nurse or tell the nurse that you had a broken bone in your shoulder while there?

A. He says he made a complaint to the nurse fifteen days afterwards—his shoulder was paining all the time and he made a complaint the shoulder was broken.

Q. Take your coat off and point out to the jury exactly where that pain is.

(Witness does so.)

Q. Point out the exact spot on your shoulder where the pain is. A. He says on his shoulder.

Q. Take your shirt down. (Witness removes his

(Testimony of Tony Possus.)

shirt and undershirt.) Now, point out the spot where the pain is.

A. Right there (indicating).

Q. Turn to the jury and point out the spot.

(Witness does so.)

Q. Got any pain in this shoulder? (Referring to the other shoulder.) A. No.

Q. When did the nurse take these stitches out of the cut over your eye?

A. He says he don't remember—it was seven or eight days.

Q. Do you remember looking in the glass and telling her she did a splendid job?

A. He says he remembers.

Q. He did? A. Yes. [73]

Q. You remember the nurse asking you shortly after you came to the hospital if you wanted to be sent to town, do you not?

A. He says he don't remember.

Q. Is it not a fact that in reply to that question you stated no, addressing the nurse—you stated, "No, you got two or three boys all right that have been here and I guess you can attend to me," or words to that effect?

Mr. RITCHIE.—We object, for the reason that he was not the judge of his own injuries, and too indefinite.

(Question withdrawn.)

Q. Is it not a fact that at the defendant's temporary hospital, at Ellamar, between the 12th and the 20th day of January, 1916, yourself and Mrs. Tra-

(Testimony of Tony Possus.)

montin being present and none others, the following conversation took place between you, in words to this effect: Mrs. Tramontin asked you if you wanted to be sent to Valdez for treatment by a physician; in reply to that you stated, "No, you (meaning Mrs. Tramontin) were successful in taking care of other miners who have been injured and I guess you can take care of me"?

Mr. RITCHIE.—We object to that as irrelevant and immaterial as an impeachment question, for the reason that this man was not a judge of his own condition.

Objection overruled; plaintiff allowed an exception.

A. He says there was no such conversation between him and Mrs. Tramontin about that, sending him up to Valdez.

Q. Is it not a fact that shortly after you were brought to the company's temporary hospital at Ellamar, after the accident, that Mrs. Tramontin, the nurse, bandaged your arm up this way (indicating) with adhesive bandages, running over your shoulder and around your body, holding your arm firmly and it [74] remained that way, in that position, for about two weeks?

A. He says no—his arm was in this position after the first bandage (indicating).

Q. Is it not a fact that you left the company's temporary hospital after you were there something over three whole weeks and you told Mrs. Tramontin, the nurse, at the time that you were going over

(Testimony of Tony Possus.)

to the bunk-house, where you would have some of the boys to talk to?

Mr. RITCHIE.—Is that intended for an impeaching question?

Mr. DONOHOE.—No, that is not an impeaching question.

A. He says he has not left the hospital of his own accord, he says he was ordered by Mr. Gedney to leave the hospital.

Q. Did you not state to Mrs. Tramontin that you were going to the bunk-house where you would have some of the boys to talk to? A. No.

Q. At the time you left the hospital, the cut on your forehead was entirely healed, was it not—over your eye? A. It was not healed.

Q. It was not healed? A. No.

Q. Hadn't Mrs. Tramontin taken the stitches out before you left the hospital?

A. It was taken out three days after he was in the hospital—it was in the bunk-house.

Q. Where was he when Mrs. Tramontin took the stitches out of the cut over his eye?

A. At her house.

Q. Is that what is called the hospital?

By the COURT.—Was it her house or at the hospital?

A. He claims it was taken out twice—when he was in the hospital stitches were taken out and after at her place. [75]

Q. At the time you left the hospital, you were perfectly able to take care of yourself, were you not?

(Testimony of Tony Possus.)

You didn't need anybody to assist you in dressing?

A. No, he was not able.

Q. He wasn't able to put on his coat alone—you were not able to put on your coat alone at the time you left the hospital?

A. No.

Q. You were not able to use your right arm in eating at the time you left the hospital?

A. He was using his left arm—wasn't able to use his right arm.

Q. Could you use your right arm in eating at all?

A. No.

Q. When did you first recover the use of your right arm to the extent that you could roll cigarettes with your right-hand?

A. He says in about twenty days he was able to roll a cigarette.

Q. About twenty days?

A. About twenty days, yes.

Q. Do you remember Doctor Duckwall examining you in the company's hospital on or about the tenth day of February, 1916?

A. Yes, sir, he remembers.

Q. Now, what did Doctor Duckwall have you do when he was examining you?

A. He said he was ordered to take his shirt off and Doctor Duckwall asked him if he could lift his arm and he said he wasn't able to lift it, and he was just twisting his arm back and forth like that (indicating) and that was all.

Q. Is it not a fact that at Doctor Duckwall's request you placed your right-hand on your left

(Testimony of Tony Possus.)

shoulder, crossing your breast with your arm in this position (indicating)? A. He says, no.

Q. Is it not a fact that at that examination, at Doctor Duckwall's [76] request, you placed your left hand on your right shoulder, with your arm across your breast, in this position (indicating)?

A. He says he was asked but he wasn't able to put his arm there.

Q. Is it not a fact that in that examination, at Doctor Duckwall's request, you placed both your arms in front of you, joining your fingers in front, so as to be even at the full length of your arm?

A. He says no.

Q. Is it not a fact that at that examination, at Doctor Duckwall's request, you extended your arms behind you, with the tips of your fingers together, of each hand, so as to measure the length?

A. He was asked to do it, but he was not able to do it.

Q. Is it not a fact that after the examination was over, you dressed yourself unassisted, putting on your shirt and vest and coat?

A. He was assisted by Mrs. Tramontin to dress.

Q. What did Doctor Duckwall tell you after he had completed his examination of you?

A. He says nothing was broken in his shoulder and he was sound and healthy.

Q. Is it not a fact that he also said you were just simply loafing? A. He says no.

Q. Now, how long was it after that examination by Doctor Duckwall when you left Ellamar?

(Testimony of Tony Possus.)

A. He says it was one day after the examination he was thrown out of the bunk-house there.

Mr. DONOHOE.—We move to strike the answer as not responsive.

The COURT.—The answer may be stricken.

(Question repeated.)

A. He left Ellamar five days after the examination.

Q. Where did you go? [77]

A. Came to Valdez.

Q. After arriving in Valdez, did you consult any physician in Valdez in regard to your right shoulder or clavicle?

A. He says he was examined by some physician but he has forgotten his name—he don't remember his name.

Q. Was it the physician whose office you were in yesterday afternoon—Doctor Boyle?

A. No, it was another doctor.

Q. Was it Doctor Winans, who is in the same building where your attorneys have their offices?

A. No, it was not in the same building—he says the doctor that examined him wore glasses, he says he don't know the name—he don't remember the name.

Q. What did that doctor tell you as to your condition?

A. He was telling him he would have to perform an operation on his shoulder.

Q. Do you claim you were suffering pain all that time? A. Yes, sir.

(Testimony of Tony Possus.)

Q. And the doctor told you that he could not relieve that pain without performing an operation, did he? A. Yes, sir.

Q. And you don't know the name of that doctor, or where his office was?

A. He said he was examined by Doctor Boyle the second time, but he don't remember the other name.

Q. When were you examined by Doctor Boyle?

A. He says it was a very short time afterwards.

Q. A very short time after you came from Ellamar?

A. He says Doctor Boyle wasn't in Valdez at that time but he came shortly afterwards and he was examining him when he came to Valdez.

Q. Can you fix the date or about the date when you were examined [78] by Doctor Boyle?

A. He says he don't remember.

Q. Was it in the month of February, 1916?

A. He says in the summer-time.

Q. Then after leaving Ellamar, about the 14th of February, 1916, you didn't consult any doctor but this one whose name you do not remember and where his office is you don't remember, until some time in the summer of 1916, when you consulted Doctor Boyle—is that correct?

A. He says there was nobody examined him until Doctor Boyle came to Valdez.

Q. And was that in the month of July?

A. He says he don't remember the date or the month when it was—it was some time during the summer.

(Testimony of Tony Possus.)

Q. And during all this time, until Doctor Boyle examined you, you were suffering intense pain in that shoulder—you claim you were suffering intense pain in your right shoulder from the time you left Ellamar until Doctor Boyle examined you?

A. He says his arm was paining all the time.

Q. Now, what did Doctor Boyle tell you was your trouble?

A. Doctor Boyle said to him, the arm would have to be broken over again and reset.

Q. The arm would have to be broken over again and reset? A. Yes.

Q. You are positive that Doctor Boyle told you that, are you? A. Yes.

Q. And Doctor Boyle told you that there was no relief for you but to break your arm over again and reset it—is that right? A. He says yes.

Q. Did he suggest to you massage treatment of the muscles of your shoulder and around your right clavicle and hot applications? [79]

A. He says he was suggesting that, telling him that.

Q. Why didn't you have him treat you that way?

A. He says he wasn't treating him that way—he says he wasn't given that course of treatment because he was short of money and he wasn't able to pay for it.

Q. You went to Cordova, did you not, some time in the month of March, 1916, to consult a physician there regarding your right shoulder or right clavicle?

(Testimony of Tony Possus.)

A. He went in the month of March, he went to Cordova.

Q. Doctor Chase examined you in Cordova, did he not?

A. Doctor Chase and some other doctor—Doctor Council, he says.

Q. Did Doctor Chase take an X-ray of your right clavicle, take a picture with the X-ray?

A. Yes, sir.

Q. What did Doctor Chase tell you was the matter with you? A. He said his shoulder was broken.

Q. He told you that your shoulder was broken?

A. Yes, sir.

Q. You are sure of that, are you?

A. Yes, sir, he is sure of that.

Q. What did he suggest, what did Doctor Chase tell you ought to be done to your shoulder?

A. He said it would have to be broken over and reset it again—that is the words that Doctor Chase told him.

Q. Now, in the month of April, 1916, the defendant company requested you to come to Ellamar, did they not, so their doctor might examine your shoulder, take an X-ray of it? A. He says yes.

Q. And they offered to treat you in their hospital at Ellamar free of any charge to you, did they not?

A. Yes, sir, he was asked to stay there. [80]

Q. And you refused to go, is that not a fact?

A. Yes, he refused to go.

Q. Now, then, in the month of August the defendant company again requested you to come to Ellamar

(Testimony of Tony Possus.)

for examination and treatment, did they not?

A. He said he was asked only once to go there.

Q. Didn't your attorney write you, notifying you—didn't your attorney, Mr. Ritchie, notify you in the month of April, 1916, that the company requested you to come to Ellamar for examination and treatment for any injuries you might have?

A. Yes, he was asked by Mr. Ritchie.

Q. Then again you were asked in August, at the time you did go, were you not?

A. He says he went the second time when he was asked.

Q. He went the second time? A. Yes.

Q. And Doctor Gross examined you there, did he?

A. Yes, he was examined by him.

Q. And he offered at that time to give you free treatment until he cured any soreness in your shoulder? A. Yes, he was asked.

Q. And you refused to stay there and be treated?

A. He says he refused because he was afraid.

Q. What were you afraid of?

A. He was afraid of getting the treatment that was there at the hospital and the camp and that was the reason he refused to stay there and get treatment.

Q. Is it not a fact the reason you refused to stay was because you demanded the company pay you \$2,500 and you refused to take treatment because they wouldn't pay it to you? [81]

A. He says he was afraid to go to the hospital because the treatment was so bad the first time when he

(Testimony of Tony Possus.)

got hurt and he couldn't understand the second question right.

Q. Didn't you demand of the company at that time \$2,500?

A. He said that Mr. Middlecamp asked him what he wanted for a settlement and he said if he would give him \$2,500 for his injuries, that was all he wanted—that was his answer, and expenses.

Q. Mr. Middlecamp at that time offered you free board and lodging and treatment by the company's doctor and hospital and everything, if you would stay there to be treated? A. Yes, sir.

Q. And you refused to stay there, is that correct?

A. Yes, sir.

Q. Now, in that examination, didn't the doctor request you and didn't you place your right hand on your left shoulder, across your breast, in about this position (indicating)?

A. He was asked to by the doctor.

Q. Did he do it? A. No.

Q. You couldn't do it? A. No.

Q. Did you put your left hand on your right shoulder, with your arm across your breast, in this position (indicating)?

A. He says he was able to put the left hand on the right shoulder.

Q. Is it not a fact that Doctor Gross requested you to extend out your arms, both arms in front of you, with your fingers together, at full arms'-length?

A. He says no.

Q. Is it not a fact that at the doctor's request you

(Testimony of Tony Possus.)

extended your arms in a similar position behind your back? A. He says no. [82]

Q. Is it not a fact that at the examination which took place yesterday at Doctor Boyle's office of yourself that you complained of the pain being on the top of your right shoulder, about the point of your right shoulder, there on top? A. Yes, sir.

Q. What doctor did you consult with last night after that examination was over? A. Nobody.

Q. You didn't have any talk with Doctor Boyle or Doctor Winans after that examination was over?

A. No, he wasn't having no conversation with no doctor.

Q. Is it not a fact that the first time you complained of pain over your right clavicle was in the courtroom here to-day? A. He says no.

Q. Where did you complain of the pain being at that point previous to to-day?

A. He says he complained in Ellamar about the pain in the shoulder.

Q. To whom? Doctor Gross?

A. Doctor Gross, yes.

Q. Did you complain at that time that the pain was over the right clavicle, as you did to-day—is it not a fact that you complained that there was a pain on the top of your right shoulder?

Mr. RITCHIE.—We object to the question unless he knows the meaning of the word "clavicle."

The COURT.—Do you understand the question, Mr. Seminoff?

(Testimony of Tony Possus.)

The INTERPRETER.—Yes, sir, I understand the question.

The COURT.—He may answer.

A. He says it pained him more over the clavicle than it does on top of the shoulder.

Q. Did you ever have rheumatism?

A. No. [83]

(By Mr. RITCHIE.)

Q. Were you ever injured in that shoulder before?

A. No.

Q. Did you ever have anything wrong with it at all?

A. He says he was not sick in his life, his whole life.

Q. The question is— Did he ever have anything wrong with that shoulder before? A. No.

Q. You never had a sprain or had rheumatism or anything in it? A. No.

Q. Now, a while ago you stated, in answer to a direct question from Mr. Donohoe, that it was in 1914 that you last sent money to your mother; you had previously stated that it was just before you came to Alaska from Utah and you have also stated that you came to Alaska from Utah in 1915— Now, which is correct?

Mr. DONOHOE.—We object to that question on the ground that it is leading and on the ground that the original answer might be correct.

The COURT.—Put the direct question to him when he last sent money to his mother.

Q. When did you last send money to your mother?

(Testimony of Tony Possus.)

A. He says some time the first part of May from Salt Lake City.

Q. How long was that before you came to Alaska?

A. Just a month.

Q. You came to Alaska soon after you quit working near Midway, Utah, did you? A. Yes, sir.

Q. Mr. Donohoe was interested in your ability to roll cigarettes— How long was it after you were hurt before you were able to roll cigarettes for yourself? A. It was about twenty days.

Q. Prior to that, could you use your arm to any extent? [84]

Q. How many men were employed at the Ellamar mine when you were hurt?

A. Somewhere between seventy and eighty, maybe a little less—he didn't know the exact number.

Q. When Doctor Duckwall was down there, just what exercises did he put you through?

A. He says he wasn't exercising at all.

Q. What motions did he ask you to make with either arm?

A. The doctor was holding his arm and was lifting it himself, but he was not able to lift it.

Q. When the doctor asked you to put your arm in a certain position and you were unable to do it, did he take hold of it and move it there himself?

A. He said he could bring his arm as far as half way to the shoulder.

Q. Who was present when Doctor Duckwall examined you? A. Mrs. Tramontin.

Q. Did you take off your clothing from your shoulder?

(Testimony of Tony Possus.)

A. He says she was helping him take his shirt off.

Q. Was he then staying in bed?

A. He was in a standing position.

Q. That was after he had gone to the bunk-house?

A. Yes.

Q. He was able to walk around then and was fully dressed, was he? A. Yes.

Q. Now, ask him again, did he strip to the waist when the doctor examined him?

A. Yes, he was taking all his clothes off.

Q. Taking off all his clothes, his shirt and everything above the waist? A. Yes, sir.

Q. How much time did the doctor take examining him? [85]

A. He says between three and four minutes only.

Q. Mr. Donohoe asked you in regard to certain motions that Doctor Duckwall wanted you to make, putting your arms in certain positions— Did he ask you to make any other motions than those Mr. Donohoe asked about? A. He says no.

Q. Did he ask you to raise your right arm above your shoulder or try to do it?

A. He says he asked about it, he asked to, but he wasn't able to lift it.

Q. What examination did he make of your right shoulder?

A. He says just lifting the arms up over my shoulders and that is all there was to examining him.

Q. Did he feel the shoulder carefully with his own hands? A. Yes.

Q. Did he ask you where you suffered pain, if any?

(Testimony of Tony Possus.)

A. He wasn't asking him the place where the pain was—he just put his hand over his shoulder.

Q. Did he say anything to him about the bones?

A. He says he wasn't asking him at all.

Q. Did he say anything to him about a bone being broken or not?

A. He didn't say anything—he said you are strong and healthy—there is nothing the matter with you.

Q. He told him he was able to go to work?

A. Yes, sir, he told him he was able to go to work.

Q. And anything wrong with him was in the imagination— Now, do you know what the scapula is, how far it extends? Put your left hand, if you can, on your right shoulder and indicate where the scapula is?

(Witness does so.)

Q. Now, do you know where the clavicle is? Do you know the difference [86] between the scapula and clavicle? A. He says he knows it.

Q. You don't know the exact day when you came to Valdez from Ellamar?

A. He don't remember.

Q. Except that you told Mr. Donohoe it was about five days after Doctor Duckwall examined you?

A. Five days after he was examined by Doctor Duckwall.

Q. How long had you been in Valdez before you went to a doctor?

A. He says he was three days in town when he went to see a doctor.

(Testimony of Tony Possus.)

Q. Where did you see that doctor, where was his office?

A. He says right in this street—there was a big house over here, close by.

Q. Was it Doctor Dalton?

A. Yes, sir, Doctor Dalton.

Q. Was he the first doctor you saw?

A. Yes, that was the first doctor he was examined by.

Q. That is up here? A. Yes, sir, in Valdez.

Q. And that is the doctor you were trying to think of when Mr. Donohoe was asking you about the examination the doctors made?

A. He says, there was another doctor, it wasn't Mr. Dalton.

Q. The first doctor you consulted was Doctor Dalton, who lived in a large house in a side street here, was it? A. It was Doctor Dalton.

Q. Now, afterwards, before you went to Cordova, did you consult another doctor in this town?

A. He says there was a doctor examining him but he don't remember his name, after Doctor Dalton examined him.

Q. After Doctor Dalton examined him, you went to another doctor in town? A. Yes. [87]

Q. Where was his office?

A. He says, where the drugstore was.

Q. Did you ever consult any doctor in the same building where our office is?

A. Yes, he was examined by some doctor who was in the same building that your office is.

(Testimony of Tony Possus.)

Q. Was that Doctor Winans?

A. Yes, Doctor Winans.

Q. The doctor that was in Doctor Boyle's office with the rest of them yesterday when they took the X-ray of you— Do you know that gentleman sitting by the door back there? A. Yes, sir.

Q. Who is that? Is that the doctor in our building that you consulted last spring?

A. Yes, that is the doctor.

Q. Doctor Winans. Now, what did Doctor Dalton tell you about your shoulder, the first doctor?

A. He says he was bandaged up and his arm was put up like that and he was kept that way for three days.

Q. Doctor Dalton fixed up his shoulder that way, put it in a bandage? A. Yes, sir.

Q. When you saw Doctor Winans, what did he say to you?

A. He said Doctor Winans asked him to bandage up very tightly and it might help his broken parts.

Q. Did either one of these doctors, Doctor Dalton or Doctor Winans, talk about having an X-ray taken of you, suggest it to you? A. Yes.

Q. Is that the reason you went to Cordova and had the X-ray taken? A. Yes, sir.

Q. Who was present when the X-ray was taken in Cordova?

A. He says Doctor Chase and another doctor, he couldn't remember his name. [88]

Q. He did name him a while ago—wasn't it Doctor Council? A. Yes, Doctor Council.

(Testimony of Tony Possus.)

Q. Did both of those gentlemen examine your shoulder? A. Yes, they examined his shoulder.

Q. And they took the X-ray together?

A. Yes, sir.

Q. When they asked you to go to Ellamar in April, how was that request made to you?

A. Through you, he says, Mr. Ritchie.

Mr. RITCHIE.—At this time, since a request was made in writing and is so treated by the defendant, I wish to read into the record the letter.

Mr. DONOHOE.—It will be introduced in evidence when we come to our defense. It is in the record, in the complaint, anyway. The whole correspondence will be introduced.

Mr. RITCHIE.—Very well.

Q. You say the request for you to go to Ellamar came through me? A. Yes, sir.

Mr. RITCHIE.—It is admitted that the letter or at least a copy of the letter came to me?

Mr. DONOHOE.—Yes.

Q. You have told Mr. Donohoe that you refused to go, admitted that you refused to go and you gave him the reason why you refused to go?

A. Yes, sir.

Q. You stated to Mr. Donohoe, as I understand you, that it was on account of the treatment you received before you left Ellamar—that was your reason for not wanting to go back?

A. Yes, that was his reason.

Q. Why did you leave Ellamar when you finally came away?

(Testimony of Tony Possus.)

A. He says he left Ellamar because they didn't treat him right in [89] the hospital up there.

Q. Why did you leave the bunk-house and go to Jim Fielder's?

Mr. DONOHOE.—We object that that as repetition.

The COURT.—He may answer.

Objection overuled; defendant allowed an exception.

A. He was ordered out from the bunk-house.

Q. You testified to that—by Mr. Gedney?

Mr. DONOHOE.—We object to that.

Q. Who ordered you out of the bunk-house?

A. Mr. Estey.

Q. Where did you have the conversation with Mr. Estey? A. He was asked to come to the office.

Q. He was asked to come to the office? A. Yes.

Q. Did he go? A. Yes, he went to the office.

Q. That is the office of the company, where Mr. Estey was? A. Yes, sir.

Q. Now tell what conversation took place between you and Mr. Estey there?

A. He says he was asked—

Q. Give the exact words if you can?

A. Mr. Estey was telling him to go to work, why didn't he go to work; Mr. Estey was asking him, why didn't he go to work.

Q. Then what else was said?

A. And then Tony said, I am not able to work and Mr. Estey opened the door and told him to get out.

(Testimony of Tony Possus.)

Q. What did he say—tell him to give the exact words Mr. Estey used if he remembers?

Mr. DONOHOE.—We object to that question on the ground that there is nothing in the pleadings complaining of this treatment by Mr. Estey. [90]

The COURT.—He may answer. The objection will be overruled and exception allowed.

Q. What did Mr. Estey say to him?

A. He said, “Get out of here, you Bohunk son-of-a-bitch”—that is just what he said.

Q. And then did you get out?

A. Yes, he said he left.

Q. Is that one reason why he didn’t want to go back to Ellamar? A. Yes, sir.

(By Mr. DONOHOE.)

Q. Now, when this conversation between you and Mr. Estey took place in the office of the company at Ellamar, that was after Mr. Duckwall, Doctor Duckwall, had made his examination of you, was it not?

A. It was the second day after he got examined by Doctor Duckwall.

Q. You said something about Doctor Winans—what did Doctor Winans advise you as to the injury to your right shoulder?

A. He says he was tied for three days and then his arm turns black and then he took that bandage off.

Q. Who put that bandage on, Doctor Winans?

A. Doctor Winans.

Q. Did Doctor Dalton put any bandage on your arm? A. He says no.

Q. Did Doctor Winans tell you that it was neces-

(Testimony of Tony Possus.)

sary for you to have your shoulder broken and reset?

A. He said yes, he was telling him that.

Q. Did he tell you, when he took that bandage off, that he couldn't give you any further relief except by an operation?

A. He says, yes, he was telling him that way.
[91]

Q. He couldn't do anything for him except by an operation? A. Yes.

Q. And he offered to perform an operation upon your shoulder? A. No, he wasn't asked to do it.

Q. Did Doctor Dalton offer to perform an operation upon your shoulder?

A. He says that the first doctor that examined him, Doctor Dalton, was asking him to have performed an operation—Doctor Dalton, the first doctor that examined him; he asked him to perform the operation.

Q. What did the doctor say—the doctor said he would have to have an operation performed?

A. Yes, sir.

Q. Did Doctor Boyle tell him it was necessary to have an operation performed in order to remedy the defects of the clavicle?

A. Yes, sir; Doctor Boyle was telling him.

Q. And did Doctor Boyle offer to perform the operation?

A. Yes; Doctor Boyle was offering to perform the operation.

Q. How much of a fee did Doctor Boyle say he would charge him for it?

(Testimony of Tony Possus.)

A. He said maybe three hundred dollars, or maybe four or five hundred dollars. He don't know what it was, but it was over three hundred dollars.

Q. Did he explain to him what he proposed to do in this operation?

A. Yes, the doctor told him he was going to perform the operation.

Q. What did he say he would do?

A. He said he would have to break them over again and clean the two parts of it and put some silver wire inside, something like that—that is what he explained.

Q. Some silver wire? A. Yes, inside of him.

Q. At this time the doctor told him his clavicle was healed, did [92] he not, bound together?

A. He said he don't remember his telling him that.

Q. Doctor Dalton told him he would have to break the bone in his clavicle, did he?

A. Doctor Dalton was telling him that he would have to break it.

Q. When you went to see Doctor Dalton, it was three days after you came over from Ellamar and you left Ellamar five days after Doctor Duckwall examined you? And when you came to Doctor Dalton's place, Doctor Dalton told you that it was necessary to break the bone and reset it—is that right? A. He don't understand exactly.

Q. You went to Doctor Dalton three days after you arrived in Valdez from Ellamar?

The COURT.—He has already testified to that.

Q. When you went to Doctor Dalton, did he tell

(Testimony of Tony Possus.)

you that it was necessary to break the clavicle bone and reset it? A. He says yes.

Witness excused.

WHEREUPON court adjourned until to-morrow (Friday) morning at ten o'clock. [93]

Friday, January 5, 1917—Morning Session.

Testimony of Frank M. Boyle, for Plaintiff.

FRANK M. BOYLE, called and sworn as a witness in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. RITCHIE.

Q. What is your name? A. Frank M. Boyle.

Q. Where do you reside?

A. I am a resident of Valdez.

Q. How long have you lived in Valdez?

A. I have lived in Valdez for a period of fourteen years and a half.

Q. What is your business or profession?

A. I am a practicing physician and surgeon.

Q. Are you a graduate of a medical school?

A. I am.

Q. What institution?

A. I am a graduate of the Medical Chirurgical College of Philadelphia.

Q. What year did you graduate?

A. In the year 1895.

Q. Have you been engaged in the practice ever since?

A. With the exception of two or three years I have been engaged in the practice of my profession.

Q. Where did you practice before you came to Alaska?

(Testimony of Frank M. Boyle.)

A. I was practicing in the Yukon Territory and in British Columbia.

Q. Are you acquainted with the plaintiff here, Tony Possus? A. Yes, sir.

Q. Did you ever treat him or examine his professionally?

A. I first examined the plaintiff Possus last July. I have seen him two or three or three or four times since then.

Q. State what examination you made last July, and what condition you [94] found him in, if anything other than normal?

A. The examination made last July revealed a fracture of the right clavicle at the outer third, with a partial overlapping.

Q. You say you have examined him several times since? A. Yes, sir.

Q. Has the condition of that changed at all since then? A. No, not perceptibly.

Q. It is in practically the same condition now as it was then? A. Yes.

Q. Will you take Mr. Possus up there before the jury and have him take off his shirt and point out to the jury the abnormalities, if any, that existed in his right clavicle or shoulder?

A. Yes, sir. Do you wish me to demonstrate to the jury this condition?

Q. Yes; I wish you would point out first what you say is an abnormal or unusual condition. Is it the result of an accident or not, any unusual condition there? A. That would be my presumption.

(Testimony of Frank M. Boyle.)

Q. Now, point out how it is out of the normal as you regard it?

(The plaintiff comes forward and removes his shirt.)

A. This is the right clavicle, extending from the sternum here out to the shoulder. Of course, this is the duplicate, the left clavicle on the opposite side. You can palpate this by doing what I am doing here. An examination of this right clavicle reveals a break at what is known as the outer third and I will now imbed my finger in that break. There is the break. This is the end of the clavicle here, where my thumb points. Now, on the opposite side we have a normal clavicle which will afford us a basis of comparison. You will find here that there is no condition of that sort exists the same as there does here on [95] this side, that is to say, this clavicle is quite normal. Furthermore an examination reveals that there is a shortening of this right clavicle of approximately three-eighths of an inch and that shortening, in my opinion, is due to this partial overlapping here at this break. Now, I will demonstrate to you further—between my upper and lower fingers here, I have this clavicle right between my fingers and you can see the width there. That unusual width is due to the callous and the partial overlapping there. This is the break here where my finger is buried.

Now, on the opposite side here you will see the contour of the clavicle there, and you will notice the difference in the width of the clavicle here and the clavicle here is quite noticeable. My fingers are on

(Testimony of Frank M. Boyle.)

the upper and lower side of this clavicle—that demonstrates the thickening there at the break and where there is partial overlapping.

Q. I want to ask you a question. Will you indicate where is the outer end of the clavicle—it connects there with the scapula or shoulder blade?

A. Yes. This clavicle or shoulder blade articulates with the shoulder blade here—the collar-bone, rather, articulates with the shoulder blade back here. This is a very complicated joint, the shoulder joint, and it is very difficult to describe unless I have an anatomical specimen here to illustrate. This point articulates with what is known as the acromial process of the shoulder blade, about in here.

Q. As I understand you, there is an opening or depression in the collar-bone, near the outer end?

A. Right here where my finger is now.

Q. Now, on the other side is the collar-bone or clavicle perfectly [96] smooth and straight across there?

A. Well, it is not perfectly smooth and straight—it is a normal clavicle.

Q. Is there any depression here similar to the one there? A. No, there is not.

Q. Is that an abnormal depression or could it be natural?

A. It is an abnormal condition there, the result of what I consider has been a fracture.

Q. Will you explain what you mean by an overlapping?

A. By an overlapping I mean that the bone

(Testimony of Frank M. Boyle.)

partially overlaps like this (indicating). Unfortunately an X-ray picture does not reveal that overlapping. It is an interior and posterior picture and may not reveal an overlapping.

Q. If there are two ends of bones protruding past each other—that is the condition, is it not?

A. Yes.

Q. Are the ends horizontal to each other or perpendicular to each other? Are they like this or like that (indicating)?

A. They are like this more (indicating)—looking at them this way, anteriorly and posteriorly, like this.

Q. They are on the same horizontal plane?

A. Yes.

Q. Not one vertically over the other? A. No.

Mr. RITCHIE.—I would like to have any member of the jury, if they wish to do so, come and place their fingers on the plaintiff's right and left clavicle at the same time and let Doctor Boyle indicate the condition which he states is there—if any of you gentlemen wish to do it, or if you are satisfied with the statement of the doctor, all right.

Q. Have you any cuts here in Gray's Anatomy which would illustrate [97] this more clearly than your statement?

A. Yes, there is an illustration in this anatomy.

Q. Take that and show it to the jury and make any explanation you consider necessary—is that a late edition?

A. Yes, that is one of the late editions. This is

(Testimony of Frank M. Boyle.)

an illustration here of the clavicle.

Mr. DONOHOE.—Is that going to be introduced in evidence, the whole book?

Mr. RITCHIE.—Not the whole book.

The WITNESS.—I would not object to having the page removed and it can be replaced.

Mr. DONOHOE.—If the doctor hasn't any objection to removing that page, the writing can be cut out and the page can be put in if it becomes necessary.

Mr. RITCHIE.—If it is satisfactory to counsel, we will stipulate that unless we can get a substitute for the record, that page may be removed for the record.

The COURT.—The writing would not properly be a part of it. Give the stenographer the number of the page.

Mr. RITCHIE.—It is page 170, of Gray's Anatomy.

Q. Use that cut as an illustration, Doctor—you may explain by means of the cut.

A. This is a picture of the clavicle or collar-bone; this is the sternal end, that is the end that articulates with the chest bone and this is what is known as the cranial end, or the end that articulates with the shoulder joint. Now this fracture is approximately here, across here, in what is known as the outer third. This is a picture of the left clavicle and this is an anterior picture and this a posterior, that is, one a picture from the front and one a picture from the back of the same collar-bone, [98] and this is approximately where the fracture has taken place.

(Testimony of Frank M. Boyle.)

Q. I have here a rubber eraser, which has been broken in two. Will you illustrate, will you take that as the clavicle which you say has been fractured and indicate, holding it up before the jury, just how and to what extent that overlapping exists?

Mr. DONOHOE.—We object to that; the doctor has already explained that by use of his fingers.

Objection sustained; plaintiff allowed an exception to the ruling.

Q. I understand, Doctor, that those ends of the bone overlap on the same horizontal plane. Now, will you kindly put your finger there and state whether either end of the bone can be felt there, that is, if the protruding end of the bone can be felt there?

A. My thumb now is up against one end of the bone, as you see here. My opposite finger is approximately at the end of the clavicle, which is here, and my thumb is up against the broken end of the clavicle.

Q. Now, is the inner end of the clavicle on the front side of the outer end as they overlap, that is, using my finger as an illustration, are they that way or that way (indicating)?

A. The other end of the clavicle is behind this end here as far as I can determine, here, right in here. Now, I have got the two broken ends there in between my fingers and I have got hold of the normal clavicle on the opposite side here, and that will give you an idea of the condition there.

Mr. RITCHIE.—That is all with the plaintiff at this time, unless you wish to make a further explanation.

(Testimony of Frank M. Boyle.)

Mr. DONOHOE.—The defendant states that he expects the plaintiff to be present when it comes to our defense in the case. (Plaintiff takes his seat.)

Q. You stated a while ago that the right clavicle is approximately [99] three-eighths of an inch shorter than the left clavicle? A. Yes.

Q. Is that a normal condition?

A. No, it is not a normal condition. In a right-handed person the right clavicle is usually longer than the left clavicle—in the case of the plaintiff there, there is a shortening of the right clavicle or collar-bone which I attribute to this overlapping.

Q. You, of course, do not know the cause of this condition? A. No.

Q. Except as it has been told to you? A. No.

Q. Can you form any reasonable estimate as to the length of time that condition has existed?

A. Well, I cannot—it might have existed six months or several years,—I couldn't state with any degree of accuracy the exact length of time the condition has existed.

Q. What is the probable cause of that?

A. I would say the probable cause was a direct violence.

Q. Something like a violent blow? A. Yes.

Q. Now, has that condition materially changed since you first examined the plaintiff? A. No.

Q. It has been practically the same?

A. There is no appreciable difference in the condition now and when I first examined him.

Q. You have examined him at intervals several

(Testimony of Frank M. Boyle.)

times? A. Yes, sir.

Q. Now, what is the present result of that injury, what effect does [100] it have upon his physical condition, his muscular strength and his ability to use his shoulder, if any?

A. There is an appreciable impairment there of the use of the right arm.

Q. Explain the difficulty—is he unable to use—

Mr. DONOHOE.—We object to that as leading.

The COURT.—You may explain the impairment.

A. The examination reveals that the plaintiff has difficulty in raising his right arm. Now, I have carefully considered the fact that this man may be malingering, may be exaggerating, and I was inclined to believe that when he first came under my observation and I have watched him on the street at times and I have, up to the present time, made three or four, maybe four or five examinations, and I came to the conclusion that there is an impairment of that arm there.

Q. Now, just state a little more fully how it is affected or impaired, how it would affect or impair the use of his shoulder. State what he is unable to do that he might do if he had his normal strength.

A. Well, following the vocation of manual labor, he is under a great handicap in attempting to lift or do any hard work.

Q. Could he raise his right arm high above his shoulder so as to use it?

A. I have tested him out in that way different times, and he has great difficulty in doing it, and can

(Testimony of Frank M. Boyle.)

only do it with the assistance of his opposite arm.

Q. Does the attempted use of his shoulder cause him any apparent pain? A. Yes.

Q. Now, Doctor, you and Doctor Gross and Doctor Winans and Doctor [101] Newlove of Fort Liscom, took an X-ray in your office the other day of plaintiff's shoulder, did you not? A. Yes.

Q. I don't know whether I have the right one or not—is that the one?

A. Yes; this is an X-ray picture of the plaintiff's right shoulder.

Q. Taken about two or three days ago?

A. Yes, taken at the request of Mr. Donohoe.

Q. Now, can you hold that before the light so that the jury can see it?

A. Yes; this is an X-ray picture of the plaintiff's right shoulder. This, what you see here in the humerus, this bone here (indicating). This is the head of the bone. This is the clavicle or collar-bone here, this coming along here. It doesn't show the entire collar bone, but it shows the area where the fracture exists and an examination of this at this point shows a thickening of the collar-bone, which you can observe there, a sort of bellying out like from below. It is not very noticeable, however. There is the point where the fracture exists.

Q. Does the X-ray show this overlapping that you speak of? A. No, it does not.

Q. Will you explain why it does not?

The COURT.—I think that has been answered.

Mr. RITCHIE.—We offer the plate in evidence.

(Testimony of Frank M. Boyle.)

It is admitted, without objection, marked Plaintiff's Exhibit "A" and made a part of this record.

The COURT.—You do not have a print from it?

Mr. RITCHIE.—No. Could an ordinary photographer make a print of this, Doctor Gross?

A. Yes, I think so.

Mr. RITCHIE.—I think we can agree upon that hereafter.

The COURT.—If you can agree upon a print being made, the print may [102] be substituted for the plate. For the present this plate may be admitted as Plaintiff's Exhibit "A."

Q. You stated a while ago that in a right-handed person the right clavicle is usually slightly longer than the left—that statement is made on medical authority, is it?

A. Well, that is my observation, and it is sustained by medical authority. I think you will find reference to it in the book of anatomy there on the subject of clavicles.

Q. Now, Doctor, what do you think is going to be the ultimate result of this injury to plaintiff, will it get better or worse? What do you think will be the future condition of that arm as to strength and ability to use it, I mean the shoulder and that arm?

A. Well, I am inclined to believe that there will be more or less permanent impairment of the function of the right shoulder. If this man had the benefit of a masseur and could be under the care of such a man for a period of months, there might be some improvement brought about, the result of

(Testimony of Frank M. Boyle.)

manipulations and massage and the like.

Q. You think this use of the shoulder as to strength and pliability is permanently impaired?

A. I am inclined to that belief.

Q. And which is affected the more, the actual strength of the member or the pliability or flexibility of it?

A. The inability to manipulate the shoulder is where the principal impairment is, and, of course, there is pain.

Q. At the present time, could he make an over-hand throw like a baseball player, in the condition that shoulder is?

A. He might do so, yes, but with difficulty.

Q. I mean, could he raise his arm and throw over this way (indicating)?

A. He perhaps might be able to do so, but, as I say, it would be difficult [103] for him to do so.

Q. Now, will that condition improve?

A. As I have said, if he had the proper care and the aid of a professional masseur and all these modern aids, there might be some improvement produced and probably would be some improvement produced.

Q. In your opinion, was that bone properly set to grow together after the fracture?

Mr. DONOHOE.—We object to that on the ground that it is incompetent, irrelevant and immaterial, and is attempting to sustain the second cause of action; and we include in this objection, all the objections that have heretofore been made by us to introducing

(Testimony of Frank M. Boyle.)

any evidence as to the second cause of action.

The COURT.—The objection is overruled. The only question that occurs to the Court relative to the question as presented is this, that it has been testified that the accident occurred on the 12th of January and the witness on the stand now testifies that he first examined plaintiff in July. Your question is directed to whether or not it was properly set; there is a considerable lapse of time. I suppose it would go to the weight of it rather than the competency.

Mr. RITCHIE.—I don't imagine that Doctor Boyle or any other doctor would make any positive statement as to the physical condition that existed or that came into existence months before he saw the person, but it will go to the weight of the testimony.

The COURT.—He may answer—the Court is inclined to think that it goes to the weight of the evidence rather than the competency.

Defendant allowed an exception to the ruling.

A. No, it was not, in my opinion.

Q. From the appearance of it or from the feeling of it, are you or are you not of the opinion that it was a clean fracture, a comparatively [104] clean one, or a ragged one?

A. There has been considerable excess growth around the seat of the fracture and at this time, such a length of time has elapsed, that it would not be possible to accurately determine that fact.

Q. If there had been a clean fracture, comparatively clean one, and if it had been properly set by

(Testimony of Frank M. Boyle.)

a competent surgeon, would the bone grow together naturally? A. Yes.

Q. This, of course, is only an opinion—how long in your opinion, would it have been before the shoulder would have had its absolute normal strength, would it ever have recovered its normal strength?

Mr. DONOHOE.—We make the same objection.

Objection overruled; defendant allowed an exception.

A. A fracture of the clavicle or collar-bone does not necessarily result in any impairment of the function of the shoulder, if it is properly attended to and the broken fragments are brought into correct alignment—it is not a serious condition ordinarily.

Q. Is the clavicle an unusually strong bone or the opposite?

A. Well, considering its calibre and size, it is a strong bone—exposed as it is, it is quite frequently the seat of a fracture.

Q. Is it more than ordinarily exposed and subject to fracture? A. Yes, sir.

Q. More so than a great majority of the bones?

A. Yes, sir.

Q. Now, could you answer this question: Could you venture an opinion as to how long it should have been before that man entirely recovered, if it was an ordinary fracture and it was properly set and he had entirely recovered—how long would it have been?

Mr. DONOHOE.—We object to that question—it is not a hypothetical [105] question based on the testimony. The doctor has not testified that it was

(Testimony of Frank M. Boyle.)

an ordinary fracture—he said he couldn't testify whether it was a clean fracture or a ragged fracture and therefore the hypothetical question is not based on any testimony introduced in this case.

The COURT.—I don't understand the question.

Mr. RITCHIE.—The question is somewhat involved. I will *with* withdraw the question.

Q. I wish you to give an opinion, if you feel warranted by the facts, by your knowledge of the case, as to how long it should have been, with proper surgical care, before that man would have fully recovered?

A. A fracture of the clavicle, if the bones are placed in correct alignment, heals and unites within a period of three weeks and I would say, at the expiration of two months, under ordinary circumstances, the man ought to be entirely recovered from the effects of an injury of that character.

Mr. RITCHIE.—That is all.

Cross-examination by Mr. DONOHOE.

Q. Have you ever treated a patient for a fractured clavicle? A. Yes.

Q. When?

A. Oh, I have had probably a dozen cases of my own of fractured clavicle and I have probably seen that many more of other physicians.

Q. Have you treated any in Valdez?

A. Yes, sir.

Q. Who?

A. Over at the Brown Alaska mine, over in Solomon Gulch, Solomon [106] Basin there were two

(Testimony of Frank M. Boyle.)

cases over there of fractured clavicle of employees of that company.

Q. What kind of treatment did you give them?

A. The treatment which I have always used in cases of a fractured clavicle is to get the broken fragments in correct alignment and we do that by putting on a Sayre dressing, or a modification of the Sayre dressing. That consist of a bandage, the aid of bandages and adhesive plasters, to elevate the elbow and lift up the shoulder and bring the arm up in this position, like this (indicating) and keep the shoulder up and backward and outward and immobilize it and keep it immobilized for a period of at least three weeks—that is the customary method.

Q. Where do you first attach this adhesive bandage you speak of—to what part of the anatomy do you first attach this adhesive bandage to get those results?

A. It is usully customary to place a strip of adhesive plaster, say three or four inches in width, immediately behind this arm, the purpose being to bring the arm back in that position (indicating), bring it around here and fasten it to the body like that (indicating); then a bandage is placed around here and around the opposite shoulder, right around the body and put under the elbow, and it is held in that position, as I say, immobilized. It is pretty hard for me to describe it to you.

Q. Now, when you first examined this man in July, he exhibited to you an X-ray picture taken by Doctor Chase of his shoulder, did he not?

(Testimony of Frank M. Boyle.)

A. Why, Mr. Ritchie gave me an X-ray picture that had been taken by Doctor Chase of Cordova, yes, sir.

Q. And also submitted to you a statement of Doctor Chase's opinion regarding this injury, did he not?

A. I don't think so—there was on this X-ray plate a little statement [107] to the effect that this picture had been taken by Doctor Chase.

Q. Didn't Mr. Ritchie at that time tell you that Doctor Chase claimed that there was a dislocation of the clavicle rather than a fracture?

A. No, he did not.

Q. He did not state that? A. No.

Q. Now, you say the X-ray pictures did not disclose the true condition of this bone at this time—is that correct?

A. The X-ray pictures that have been taken do not, only in so far as showing a slight enlargement at the seat of fracture.

Q. Do you at this time say that clavicle is broken now? A. No.

Q. And not fractured?

A. No, I say it has been fractured.

Q. You do not want the jury to understand from your explanation of the man's condition that the clavicle is at this time broken? A. I do not.

Q. Nor fractured? A. No.

Q. And it was not at the time you made your examination in July—it was not broken? A. No.

Q. You said something about an enlargement of

(Testimony of Frank M. Boyle.)

the bone at the seat of the original fracture—isn't that always the case when bones unite, that the place of union becomes enlarged?

A. Yes, that is quite usual.

Q. Now, where the most excellent results are obtained of a fractured clavicle, the place of union would be enlarged, would it not?

A. Yes, much the same way, you might unite a joint, as plumbers do— [108] at the seat of the junction of broken pipe, there is an enlargement there.

Q. Might not that enlargement you speak of be the natural result of the union of the clavicle where it was well set and good results obtained?

A. Not to the same extent as exists with the plaintiff's clavicle.

Q. How much would it be enlarged if the results were as good as are ordinarily obtained in a case of that kind?

A. Oh, there might be some enlargement, naturally.

Q. How much greater do you say this enlargement is than would be in the case of a good union?

A. In this enlargement, there is an overlapping of the bones and of course that increases the enlargement.

Q. How much is the increased enlargement?

A. Well, it is double or triple what it would ordinarily be, at least double what it would ordinarily be—there is a bony or osseous material around the parts.

(Testimony of Frank M. Boyle.)

Q. How much do you claim that is overlapping?

A. Well, a measurement of the right clavicle and a measurement of the left clavicle reveals a shortening of the right clavicle of three-eighths of an inch, fully three-eighths of an inch, probably more.

Q. Are you willing to stake your professional reputation on the statement that you can exactly measure the length of the clavicle, of each of the clavicles, of this plaintiff, owing to the fact that he has such heavy muscular tissue in that region?

A. Well, depending upon my sense of sight and my sense of touch, I would say yes.

Q. You feel certain you can positively measure the length of each of those clavicles in this man at this time? [109]

A. Yes and get an approximate conception as to the condition.

Q. Now, is it not a fact that the two clavicles of a great many normal persons, one is shorter than the other? A. Yes.

Q. Isn't it quite frequently true, that there is at least a quarter of an inch difference between the length of the clavicles? A. Yes.

Q. Did you give this man any treatment when he came here in July? A. No, I did not.

Q. Your testimony is not based then, as I understand it, upon an X-ray picture at all?

A. My testimony is largely based upon my special sense of sight and my special sense of touch, as far as the condition of this man's clavicle is concerned.

Q. Is it based any upon an X-ray picture?

(Testimony of Frank M. Boyle.)

A. Partially, yes.

Q. Is it based upon the X-ray picture which is now Plaintiff's Exhibit "A"?

A. This X-ray picture which I had here shows a slight enlargement there at the seat of fracture and bellying.

Q. I will ask you, Doctor, if in all cases where there is a fracture of the clavicle and the patient has been treated as you have suggested you would treat a patient for similar trouble, is there then never any overlapping of the ends of the bones?

A. If the parts are brought into correct alignment, there should be no overlapping.

Q. Did you in any of the cases you have treated never have any overlapping?

A. I have had overlapping in several cases I have treated, but it wasn't my fault.

Q. Then, when patients are sometimes treated by a skilled surgeon, there is sometimes overlapping of the ends, is there not? [110] A. Sometimes.

Q. Does the X-ray picture show any abnormal condition of the plaintiff's right clavicle?

A. It is hardly perceptible.

Q. Then for this abnormal condition which you have testified to, you rely almost entirely upon your sense of sight and feeling? A. Yes.

Q. Now, why, or on what do you base your opinion that this plaintiff at this time is suffering from a disability by reason of a fracture he did have in his right clavicle?

A. I have made several examinations of the plain-

(Testimony of Frank M. Boyle.)

tiff and I have satisfied myself from manipulating his shoulder and observing the man and studying the case that there is some impairment there of the function of that right shoulder.

Q. Now, from your scientific knowledge and surgical knowledge, what is the reason that the use of that shoulder is now impaired?

A. I cannot find any abnormality other than the shortening of that clavicle.

Q. Would the shortening of the clavicle necessarily cause any impairment of the shoulder?

A. In some instances it does and in some, it does not.

Q. You have known of cases, have you not, where the clavicle has been fractured and absolutely nothing done with it at all and it naturally grew together again? A. Yes, sir.

Q. The fracture of a clavicle is not considered a serious injury, is it? A. Ordinarily not.

Q. And you know of cases where the clavicle has reunited without [111] any service at all, do you not? A. Yes.

Q. Now, then, the only reason you can assign at this time why this man's shoulder should be impaired is because you find the right clavicle shorter than the left, is that right?

A. And the partial overlapping there.

Q. Would the partial overlapping of itself cause any impairment of the use of the shoulder?

A. It might—sometimes it does not.

Q. You cannot assign any physical reason why it

(Testimony of Frank M. Boyle.)

should, can you? A. No.

Q. You spoke of the plaintiff complaining of pain—is it not a fact that when yourself, Doctor Winans, Doctor Gross and Doctor Newlove made an examination of this plaintiff yesterday that he complained of pain in the back part of his shoulder rather than in the region of his clavicle?

A. I believe he did, yes.

Q. And he made no statement at that time that he suffered any pain in the region of the clavicle?

A. No, you can deeply manipulate the clavicle as I have done here and it doesn't elicit any pain, but when the arm is lifted up and certain muscles and certain tendons are brought into play, that does elicit pain.

Q. Did you raise his arm up yourself?

A. I have on several occasions.

Q. Did you the other day?

A. I believe I did once; yes.

Q. And you met with resistance, did you not, from the plaintiff when you went to raise it up?

A. Yes, he complained.

Q. Now, is it not a fact that that resistance came from the forearm [112] and from the muscles of the arm between the elbow and the shoulder?

A. No, as far as I could determine, there is no impairment of the function of the elbow—the trouble seems to be all in the shoulder.

Q. From raising his arm up, you could tell where the resistance came from? A. The shoulder joint.

Q. What is the condition of the muscle where pain

(Testimony of Frank M. Boyle.)

is caused—what is the instantaneous and voluntary condition of the muscles in the region of where the pain is caused?

A. There may sometimes exist a contraction or spasm of the muscles.

Q. Is it not a fact that immediately upon pain being produced, the muscles immediately harden and stiffen in the region of the place where the pain is caused? A. Not necessarily.

Q. Yet if by holding your hand over the muscles in the region of the clavicle and you raised up the plaintiff's arm and raising it up caused him pain in that region, you could tell immediately by the stiffening of the muscles in that region that that was where the pain was located, could you not?

A. No, you could not, if in the possible event that some of the smaller muscles, the lower layer of muscles, might be involved, that stiffening would not be transmitted so you could detect it by palpation or by feeling.

Q. I believe you testified that you found no tenderness in the region of the clavicle?

A. I could detect no tenderness.

Q. Now, if the patient was suffering from the present result to his right clavicle, would you not find tenderness and soreness in that region? [113]

A. Why, there might be, yes—of course you can't palpate the under side of a clavicle, only the upper and outer side—you can't get underneath it.

Q. You never advised this man that it was necessary for him to have a surgical operation, did you?

(Testimony of Frank M. Boyle.)

A. No, I did not.

Q. Your treatment of his present condition and of his condition as it was in July when you examined him would have been massage, with hot applications and liniment rubbed in, is that right?

A. Yes.

Q. That is the treatment you would have recommended for him?

A. Yes,—a surgical operation might possibly aid the condition, but I would be reluctant to recommend it.

Q. It is not the usual method of treatment for fractured clavicle, however, a surgical operation?

A. In cases where there is difficulty in keeping the parts in correct alignment and there is a marked overlapping and that overlapping cannot be corrected by appropriate splints and immobilizing the parts, it is oftentimes necessary to have a surgical operation and cut down on the broken ends and wire them together or as it is done nowadays more particularly, introducing little bony strips there and fastening them together that way with plugs.

Q. Do you recall now of ever performing a surgical operation in the case of a fractured clavicle?

A. I never have.

Q. And you have never seen one, that has come under your observation?

A. I have only seen one case and that was a compound fracture where a clavicle had broken and had penetrated the tissues.

Q. You don't consider this a case requiring a sur-

(Testimony of Frank M. Boyle.)

gical operation, do you?

A. I would be reluctant to suggest surgical interference until at [114] least such time as the man had had the benefit of careful massaging and the like, to see what results were accomplished in that way.

Q. When this man called upon you last July to make this examination of him, why didn't you treat him by massage treatment at that time?

A. He didn't come to me to receive professional treatment in that respect—he simply came to see me to have an examination made of his clavicle.

Q. Did you in the course of that examination recommend to him what would be a proper treatment for his present condition?

A. I said to him that it would be well for him to massage the parts—have them massaged and use liniments.

Q. And he didn't make any request of you to proceed to treat him, along those lines?

A. No, he did not.

Q. He just came to you for an examination and not for treatment? A. That is all.

Q. Do you know if any other doctor had treated him since he left Ellamar?

A. I do not, of my own knowledge.

Q. Is there any evidence which you have discovered in relation to this injury, other than the statement of the plaintiff himself, from which you could ascertain whether he is suffering pain from the use of his right arm at this time? A. Yes.

(Testimony of Frank M. Boyle.)

Q. What are they?

A. On attempting to manipulate the parts, the contour, the appearance of the man—it is quite evident that he is in pain and he will resist and pull away from me, and the expression of his countenance. [115]

Q. That is what you are basing your opinion on?

A. I am basing my opinion largely upon that and my observations of the man, covering a period of several months.

Q. You think he was suffering this same pain in July, do you not? A. I think he was, yes.

Q. And at that time you suggested to him that he could only get relief by means of massage and applications of liniment? A. Yes.

Q. And he didn't request you to give him any treatment? A. No, he did not say anything.

Q. Now, you, of course, compared the contour and position of the right shoulder and left shoulder of the plaintiff when you were making these examinations, did you? A. Yes.

Q. Did you discover any difference as to the appearance or contour of the two shoulders?

A. The irregularity was perceptible at the seat of fracture, as it is perceptible now.

Q. As to the position of the shoulders, what, if any, difference did you note?

A. An examination of the two shoulders doesn't show any appreciable difference.

Q. An examination of the two shoulders doesn't show any appreciable difference? A. No.

(Testimony of Frank M. Boyle.)

Q. They are both practically normal, are they—the position of the two shoulders?

A. With the exception that at the seat of fracture there is that irregularity there in the contour.

Q. Now, is it not a fact that if that right clavicle was shortened to any perceptible degree, that it would cause a drooping forward [116] of the right shoulder?

A. Sometimes there is a drooping forward of the right shoulder as the result of fracture.

Q. If that right shoulder was shortened to any perceptible degree would it not cause a drooping of the right shoulder forward?

A. It might and might not—sometimes it does and sometimes it does not.

Q. If the right clavicle was shortened three-eighths of an inch would it not cause a forward drooping of the right shoulder?

A. Not necessarily,—it might do so and might not be perceptible; this man is very well developed muscularly and a comparison of the two shoulders doesn't show any appreciable difference, that is manifest.

Q. As to this overlapping, as I understand you, you base your opinion that there is an overlapping there on your feeling and your sight rather than on the X-ray picture? A. Yes.

Mr. DONOHUE.—That will be all.

(Testimony of Frank M. Boyle.)

Redirect.

(By Mr. RITCHIE.)

Q. Mr. Donohoe has asked you a good deal about this overlapping and you have stated as I understand it that the existing condition of the plaintiff in overlapping is not natural? A. It is not natural.

Q. Would that overlapping have been as extensive as it is if the bone had been properly set in the first place?

A. If the bone had been properly set and the fracture was corrected and the parts were put in correct alignment, there ought not to have been any overlapping.

Q. The other day when the doctors were taking the X-ray in your office, [117] did or did not all of you measure the two clavicles?

A. Well, we were all present when the measurements were taken—I think Doctor Winans took the measurements and I took them I know.

Q. All the doctors saw the measurements?

A. I think so, I am not certain as to that.

Q. Now, about this possible operation to correct whatever is wrong with the clavicle, anything that is grossly wrong with it—you told Mr. Donohoe that that wasn't usual and perhaps not very often necessary—under what conditions is it necessary or important?

A. Well, where there is a marked destruction of the clavicle, an operation would be indicated—or considerable overlapping.

Q. Would that operation become more dangerous

(Testimony of Frank M. Boyle.)

and less likely to be successful after a great lapse of time from the original accident?

A. Why, the longer the time that elapsed, the results in my opinion would be less likely to be good.

Q. Assuming in this case that there was not a correct setting of the bone, would it have been a good idea to have such an operation performed about February or March—that is, would it have been more likely to be successful at that time?

A. Well, if an operation were indicated, the sooner it was done the better.

Q. Is that true of any abnormal condition, as it gets older an operation is less likely to do it any good? A. Usually.

Q. Now, Doctor, on this question of the length of the clavicle, of the comparative size and strength, etc., of the clavicle—is there any standard authority as to ordinary conditions in ordinary individuals?

A. Yes, there are various works on anatomy.

Mr. RITCHIE.—This is Gray's Anatomy. I will ask the witness to [118] read from page 171 a statement in regard to clavicles.

The WITNESS.—This is an article on clavicles. It says—Peculiarities of the bone in the sexes and in individuals. I suppose you have reference to this part marked here that you want read?

Mr. RITCHIE.—Yes.

The WITNESS.—It says—The right clavicle is generally longer, thicker and rougher than the left.

Mr. RITCHIE.—Read the whole paragraph.

The WITNESS.—(Reading:) In the female the

(Testimony of Frank M. Boyle.)

clavicle is generally shorter, thinner, less curved, and smoother than in the male; in the female it is placed almost, if not quite, horizontal, while in the male it inclines slightly downward and inward. In those persons who perform considerable manual labor, which brings into constant action the muscles connected with this bone, it becomes thicker and more curved, its ridges for muscle attachment become prominently marked. The right clavicle is generally longer, thicker and rougher than the left.

Q. Is it your view that that is a correct statement, Doctor? A. Yes.

Q. Are you able to say, and if you are able to say, state, what, in your opinion is the degree of impairment of the plaintiff's strength in the use of his shoulder and consequent impairment of his earning power by the failure to properly set this bone and have it corrected in the proper and natural way?

Mr. DONOHOE.—To which question we object as incompetent, irrelevant and immaterial in so far as it applies to the second cause of action. We have no objection to this testimony as applied to the first cause of action.

Mr. RITCHIE.—It applies wholly to the second cause of action. The second cause of action is based upon the claim that the earning [119] power of the plaintiff has been impaired permanently.

By the COURT.—The objection will be overruled. The testimony of the witness will be received by the jury as applicable to the second cause of action.

Defendant allowed an exception to the ruling.

(Testimony of Frank M. Boyle.)

A. In answering that question I can only give my opinion that the man in his present condition is impaired from performing his function, his vocation, as a laboring man.

Q. Well, is he wholly disqualified at this time; that is, is he utterly unable to perform his usual work, his usual vocation?

Same objection; objection overruled; defendant allowed an exception to the ruling.

A. If his vocation is that of a miner, I would say yes—requiring the use of both of his arms.

Q. Are you of the opinion that he will be totally disqualified to follow that vocation for the rest of his life or will he partially recover? It is only an opinion, of course—nobody can say positively?

A. As I have previously stated, if the man had the benefit of a masseur, months it would probably take, there would probably be considerable improvement in the use of that right arm, possibly there might not be.

Q. Do you think he will ever entirely recover his normal strength and flexibility in the use of that shoulder?

A. I am inclined to question whether he will.
(By Mr. DONOHOE.)

Q. What do you base your statement on that you are in doubt whether he ever will really recover the use of that right arm? [120]

A. I base my opinion upon an observation of the man and studying him.

Q. What particular defect do you find in his shoul-

(Testimony of Frank M. Boyle.)

der or in the region of his right clavicle or shoulder, which would cause him permanent disability?

A. The man to-day as far as I can determine is in no better shape than he was when I examined him last July, as far as the use of that right arm is concerned.

Q. State what physical disarrangement you find that would cause him permanent disability of his right arm?

A. The shortening of the clavicle three-eighths to a quarter of an inch and overlapping, the bone of the clavicle.

Q. That is the only thing you base your opinion on? A. That is what I base my opinion on.

Q. And in the region of that clavicle, in exploring it, you discovered no tenderness or soreness—the plaintiff experienced no tenderness in that region?

A. In exploring the clavicle anteriorly and above, I can detect no tenderness—as to whether or not there is tenderness underneath the clavicle, it is impossible for me to manipulate there and determine that fact.

Q. Are you willing to state at this time that that right clavicle is not in alignment, in natural alignment? A. I am, positively.

Q. What is the difference? What is the condition that makes it not in natural alignment?

A. There is an overlapping of the clavicle.

Q. Does the X-ray show any indications that there is not a natural alignment?

A. The X-ray pictures as taken do not. If it

(Testimony of Frank M. Boyle.)

were possible to take [121] an X-ray picture from above, downward, very likely it would show this abnormal condition; by that I mean, if it were possible to get a plate underneath here—it is not, but if the rays were transmitted from above and the plate were here, it would show this abnormality, but a picture taken posteriorly, from front to back or back to front, does not do that. Ordinarily the picture would show a thickening there at the seat of the fracture but these pictures that have been taken do not show any perceptible thickening there, but that thickening is there, quite apparent, when we manipulate the parts.

Q. Is it not a fact that that particular portion of the clavicle, in a natural clavicle, if there is no bone fractured, there is a natural prominence there of the bone which makes it thicker there at that point or apparently thicker to the touch?

A. You have the man's left clavicle there in comparison with the right clavicle—at the shoulder in both clavicles there is a thickening, a considerable enlargement.

Q. Couldn't a portion of this enlargement which you say is there be due, not to overlapping, but to the fact that the bone is naturally thicker at that point—there is a prominence at that point?

A. That condition there is not natural in my opinion.

Q. No part of it natural?

A. At the seat of the fracture it is not a natural condition.

(Testimony of Frank M. Boyle.)

Q. There is no prominence at that particular point of the clavicle that has not been fractured?

A. Nothing like to the extent that there is noticeable in this man.

Q. How much of that thickening that you speak of would be due to the natural prominence there and how much to the result of the fracture?

A. Well, the condition of the bone there and that overlapping is practically all the result—and that thickening there—is [122] practically all the result of that malposition.

Q. I believe you have testified that you know of cases where there was overlapping notwithstanding the fact that the patient had been properly bandaged shortly after the accident—you have stated that, have you? A. Yes.

Q. Then if this clavicle, this overlapping a little—if this clavicle does overlap a little it is not an unusual condition of the clavicle, is it?

A. It is a most unusual condition where a case has been under the continued observation of a physician or surgeon; it is only such cases as are not under the continued observation of a physician and surgeon that go wrong.

Q. I believe you testified that there were some cases that you had in which there was an overlapping and you said that it was not due to your fault but to some other agency?

A. Well, cases would get out of my hands and probably go away and would not be under the care of a physician.

(Testimony of Frank M. Boyle.)

Q. Now, in this case was the patient unable to raise his arm up on the side where the clavicle was fractured?

A. These cases I have had I lost entire track of them—that I had in mind—I never saw them again and couldn't state.

Q. Can you at this time state a specific case where the clavicle was broken and in the union there was an overlapping that caused the patient to lose the use of his arm?

A. I cannot recall a case of mine of that kind, no.

Q. Nothing of that kind has come under your observation? A. No.

Q. Although you have seen people where the right clavicle was overlapping, have you not, in the union from a fracture? A. Yes, I have. [123]

Q. Were those people able to raise their arm up in a perpendicular position?

A. I couldn't state as to that.

Q. Then in your experience as a physician and surgeon, you have never had a case called to your attention until this one, in which the patient's clavicle had overlapped, that caused the patient to lose the ordinary use of his arm?

A. This is the first case that I have seen of this particular character.

Q. And you have observed those conditions frequently in your practice, have you not?

A. I wouldn't say frequently—I have seen probably a couple of dozen cases of fractured clavicle during my career, perhaps a dozen which I was in

(Testimony of Frank M. Boyle.)

attendance upon personally.

(By Mr. RITCHIE.)

Q. Have you ever seen a particular case where the overlapping was as extensive as in this case?

Mr. DONOHOE.—We object to that as not re-direct examination.

Objection overruled; defendant allowed an exception.

A. I have seen cases with as much overlapping as this, yes, sir.

Q. Have you ever seen one where the clavicle was shortened as much as this? A. Yes.

(By the COURT.)

Q. The statement you read from Gray's Anatomy, was that directed to a person who was known as right-handed or left-handed?

A. Why, it would apply to right-handed people.

Q. And is this plaintiff from your observation right-handed or left-handed? [124]

A. He is right-handed.

(By Mr. DONOHOE.)

Q. Did you ever see a case of a fractured clavicle in which there was an overlapping of the bone in the union that did not shorten the clavicle more than three-eighths of an inch?

A. I have seen cases of overlapping where there would not be a shortening of over one-eighth of an inch—it depends of course upon the extent of the overlapping; the shortening is of course in direct proportion to the extent of the overlapping.

(Testimony of Frank M. Boyle.)

Q. How much do you determine the overlapping to be in this case?

A. The overlapping in this case is from three-eighths to five-eighths of an inch.

Q. How do you determine that?

A. By measurements.

Q. Are you able to ascertain the end of the inside part—

A. The sternal end of the clavicle?

Q. No. I understand you to say the overlapping is in this position (indicating). Now the inside—

A. I am basing my opinion of the overlapping upon the amount of shortening. Of course I can confirm that to some extent by manipulating the clavicle at the seat of the fracture.

Witness excused.

Testimony of Tony Possus, for Plaintiff (Recalled).

TONY POSSUS, the plaintiff, recalled.

(By Mr. RITCHIE.)

Q. Are you right or left-handed?

A. Right-handed.

Witness excused. [125]

Testimony of Charles A. Winans, for Plaintiff.

CHARLES A. WINANS, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. RITCHIE.

Q. What is your name? A. Charles A. Winans.

Q. Where do you reside? A. Valdez.

Q. How long have you lived in Valdez?

A. Eighteen years about.

Q. What is your occupation or profession?

(Testimony of Charles A. Winans.)

A. Physician and surgeon.

Q. Are you a graduate physician of some medical institution? A. I am.

Q. What college?

A. Bellevue Hospital Medical School, New York City, Bellevue Hospital Medical College.

Q. When did you graduate from Bellevue?

A. March 8, 1888.

Q. Have you been practicing your profession ever since? A. Pretty steadily.

Q. Where did you practice before coming to Alaska? A. In Benton Harbor, Michigan.

Q. And you have been practicing in Valdez most of the time since you came to Alaska? A. I have.

Q. You know the plaintiff in this action, Tony Possus? A. I do.

Q. Where did you first meet him? And when?

A. I met him, I think, it was last spring, the spring of 1916, here in Valdez. [126]

Q. About what time, as near as you can fix it?

A. I don't know; it might have been February; it might have been April—I don't know the correct time.

Q. I will ask you if you know when he went to Cordova to have an X-ray taken by Doctor Chase?

A. I don't remember the time.

Q. You didn't know about that? A. No.

Q. Did you make any examination of him at the time you first met him? A. I did.

Q. State what condition you found and if there

(Testimony of Charles A. Winans.)

was anything out of the ordinary in any part of his body.

A. I found his physical condition apparently about as it is now.

Q. Did you find anything wrong with his bone, his clavicle?

A. I found a fractured clavicle, the right clavicle.

Q. Did you make an extensive examination at that time? A. Well, as much as was possible, yes.

Q. What was the condition of his shoulder, was it perfectly normal outside of the fractured bone?

A. I don't remember what condition I found in his shoulder.

Q. I mean was it normal as to size—was there any swelling or anything of that kind, do you remember?

A. I can't remember that.

Q. Did you do anything for him at that time?

A. I did.

Q. What did you do?

A. Well, I tried to replace the bone and I found it was more or less affected at the break and the muscles were more or less rigid about the shoulder joint and I put on adhesive plasters trying to extend the distal end of the clavicle, that is, to pull the [127] bone out, one plaster around the upper arm and carried it around the body and fastened it, and the other plaster around the elbow and fastened it, this way (indicating), brought the arm up against the chest wall,—that was to extend the clavicle, pull the bones apart, but he was under that treatment for three or four days and I saw it didn't relieve his

(Testimony of Charles A. Winans.)

pain and I thought seemed to give him more pain and I abandoned the treatment, because I considered it more or less a harmless experiment, putting the dressings on there.

Q. Now, will you just describe to the jury briefly the nature and extent of that fracture?

A. Well, the fracture is about the outer third of the clavicle and the inner fragment, or the fragment next to the breast bone or the fragment that is attached to the breast bone lies forward of the outer fragment. The proximal end of the clavicle is forward and the distal end is behind,—the two fragments lie in that position, one behind the other. (Indicating.)

Q. Was that the condition at that time?

A. Well, as near as I can remember it was, yes.

Q. Now, to what extent, that is, to what length did one portion of the bone protrude beyond the other? A. I don't remember that.

Q. You remember there was a protrusion but don't remember the extent?

A. All I remember was that there was a break there,—I don't know exactly what the condition was, I have forgotten.

Q. Could you feel the break with your fingers?

A. There was a complete offset there—there was quite a prominence at that time, I remember that.

Q. Could you distinctly feel that condition with your finger? A. I could, yes.

Q. Now, did you ever examine the plaintiff after you took the bandages [128] off of him?

(Testimony of Charles A. Winans.)

A. Yes, I did.

Q. When? A. The day I took it off.

Q. Did you examine him any time afterwards?

A. I examined him nine or ten months afterwards, —that is the other day.

Q. In the meantime, after the examination you made, when you took off the bandages, you had nothing to do with his case, until all you doctors had him at Doctor Boyle's office the other day?

A. That is correct.

Q. What condition did you find the other day, this week?

A. I found apparently about the same condition; the arm is not as rigid as it was when I first saw him, it is a little bit freer, he moves it freer.

Q. Had the bone grown together since last winter, since you examined it last winter?

Mr. DONOHOE.—When? Fix the time.

Q. Since you made the examination in the early part of 1916?

A. I don't remember how firm the union was last spring, but it seems to be very firm now.

Q. There has been a union since then or a partial union?

Mr. DONOHOE.—We object to that question—the witness has not testified that there was a separation at the time he made the first examination.

Objection sustained.

Q. Was there any separation there, Doctor?

A. Well, there had been; there was a complete offset of the bone, one fragment was forward of the other.

(Testimony of Charles A. Winans.)

Q. I mean at the time you examined him in the early part of 1916, was there any separation? [129]

A. What I mean to say is, the bone had been broken—I don't know whether it was done six months before or three months or one.

Q. I am talking about the existing condition—at the time you first examined him,—was there a noticeable separation at that time?

A. I can't remember that,—all I know is I didn't reduce it at that time.

Q. Since that time, though, between the examinations you made in the early part of 1916 and the examination you made last spring, there had been a growing together, a union of the bone?

A. It might have been united to some extent at that time, at first, but it seems to be very firm at present.

Q. At the time you made the examination in the early part of 1916, the first examination, can you state whether the fracture was apparently of recent occurrence?

A. I judged that it was from the way he handled it, that is all.

Q. Now, the other day, when you took this X-ray picture in Doctor Boyle's office, did you measure the clavicle or assist in measuring it? A. I did, yes.

Q. What is the relative length of the right and left clavicle, is one shorter than the other?

A. The right one is shorter than the left.

Q. How much shorter?

(Testimony of Charles A. Winans.)

A. Something over a quarter of an inch,—from a quarter to a half.

Q. Have you measured it again, since, yourself?

A. I have once, since, yes.

Q. That was last night, was it?

A. That was last night.

Q. What did you find the difference in length at that time? A. I think it was five-eighths. [130]

Q. Now, Doctor, is it your opinion that the man's shoulder now is normal as to strength and flexibility?

A. I don't think that he has the same strength.

Q. What is necessary to restore the strength, if anything, or would it be possible to restore it?

A. It might be possible and it might not—that question is hard to answer; it is hard to say.

Q. Do you think that an operation now would do it any good?

A. That is questionable, whether an operation will.

Q. If an operation had been performed shortly after you first examined it, do you think it would have corrected the malformation and restored the strength there?

A. That is a little hard to say.

Q. Do you think that this clavicle was properly set after the injury? A. I don't know.

Q. What is your opinion, from the indications?

A. I couldn't tell anything about it,—I don't know what was done to it.

Q. All you know is the condition you found it in?

A. All I know is the condition I found it in.

Q. Is it your opinion that the man is in any way

(Testimony of Charles A. Winans.)

permanently injured?

A. Well, that is a little hard to answer—he might have a fairly useful member there. At present the motion of that extremity I think is limited from this fact, that he has guarded that arm for about a year and any part of the body that is not in use will become more or less atrophied, the ligaments will become shorter, more firm and the muscles more firm and bound down. Now, whether he will overcome that in time I can't say. There is a little more motion there than there was last spring; when I [131] examined him last spring, he guarded that arm pretty thoroughly but now there is more motion there.

Q. Did he apparently suffer pain last spring or whenever it was you first examined him—did he apparently suffer much pain there?

A. Apparently he suffered more pain then than now.

Q. Does he still suffer pain?

A. I think he suffers some, I don't know how much.

Q. Do you think he is able to raise his right arm high?

A. I haven't seen him do it,—I can hardly say as to that.

Q. Did you see him try to do it? A. Yes, sir.

Q. Do you think he raised it as high as he could without assistance?

A. I rather think he did. Possibly under excitement he might throw that arm up—it would cause

(Testimony of Charles A. Winans.)

him pain, I think; it hurts him when he does it.

Q. Would he naturally stop raising it after it caused him pain? A. Yes, sir.

Q. You are not able to express any opinion then as to the probability or improbability of his being permanently injured to any degree?

A. No, that is hard to say. I don't think the motion there will be as free as it was, around the shoulder joint, because he has guarded it so long, but it may be a fairly useful member.

Q. Is he more likely to recover the strength of the shoulder than the flexibility?

A. Yes, I think so.

Q. Do you think he can use that shoulder as well as he formerly could in the occupation of a miner, if that was his occupation?

A. I cannot tell you that for this reason I do not know how much that shoulder joint will recover its mobility.

Q. Do you think he will recover the strength and flexibility of [132] his shoulder so nearly that he can use it pretty well in overhead movements?

A. I have an idea they might be; yes, sir.

Mr. RITCHIE.—That's all.

Cross-examination by Mr. DONOHOE.

Q. When this plaintiff called upon you last year, was there a union of the clavicle at that time, the right clavicle? A. That is a bony union?

Q. Yes. A. I couldn't say as to that.

Q. You would not at this time say that the bones had not united previous to his calling at your office?

(Testimony of Charles A. Winans.)

A. No, I would not.

Q. And in your examination the other day, two days ago, with the other doctors—you know positively that there is a union there now?

A. It seems to be very firm.

Q. Didn't it appear to be fairly firm when you first examined him last spring?

A. It seemed to be firm enough so I couldn't reduce it.

Q. And in manipulating it, you could not get any results that led you to believe it had not united?

A. I can't remember the condition—that is nine months ago.

Q. You will not say, however, that it was not united at that time? A. No.

Q. Now, in case a patient came to you with a fractured clavicle at the point where this clavicle shows fracture, what kind of treatment would you give him? A. With a fractured clavicle? [133]

Q. Yes, a fracture similar to this one, in the first place?

A. I would try first to reduce it and if I could not do that, I would put on an adhesive strip—I have explained to you about an adhesive plaster—around the upper part of the arm, just below the shoulder joint and draw the shoulder and arm directly backward and fasten the adhesive plaster around the body, and that puts an extension on the clavicle and tends to draw the bones apart, and then I would draw the hand directly over the chest this way (indicating), and put an adhesive plaster around the point of

(Testimony of Charles A. Winans.)

the elbow and up over the opposite shoulder.

Q. Now, in the case of that kind of a fracture, if the patient had come to you in the first place you would not have recommended an operation or a cutting away of the bone, would you? A. No.

Q. There was no occasion for performing an operation, was there, or there was no occasion for wiring the bone together or anything of that sort?

A. That is always up to the patient, what they want done.

Q. Isn't it up to the doctor to tell the patient what should be done? A. Yes.

Q. In a case of that kind, in a similar case to the case of plaintiff, would you have recommended an operation at that time or not?

A. Well, I did to him, when he came to me.

Q. I am speaking in the first instance.

A. When they are first broken?

Q. Yes. A. No, I would not.

Q. What kind of an operation would you perform—just describe what you would have done if the patient had accepted your advice and [134] submitted himself to you for an operation.

A. If I had operated I would have made an incision directly over the bone and have separated that bone and if there was a ligamentous union, I would have divided whatever connecting tissue was there, put on an extension and freshened the end of the bone and *wiring* them together.

Q. You feel they needed a wiring together at that time? That the bones should have been broken

(Testimony of Charles A. Winans.)

apart, the ends freshened and wired together?

A. I think at that time that was the only way to bring the ends in apposition.

Q. Do you think the condition would warrant a skilled physician to recommend an operation such as you have described, at that time?

A. I recommended that because he claimed to be suffering so much pain.

Q. You didn't recommend massage treatment or anything of that sort with liniment and hot applications? A. No.

Q. Did you ever perform an operation for the purpose of uniting a clavicle?

A. No, never saw a case.

Q. You never saw one performed? A. No.

Q. Did you ever read of one being performed?

A. No,—I presume they are performed in bad cases, but I can't call any to mind now.

Q. You know in your practice of many cases where persons have had fractured clavicles and in the union they have overlapped slightly, do you not?

A. I have not had many fractures of clavicles although it is a very common fracture. [135]

Q. Have you ever observed a person who had sustained a fracture of his clavicle in which his arm was disabled to the extent that this plaintiff claims his is?

A. I can't recall any case.

Q. Now, you say, I believe, that you measured the right and left clavicle of this plaintiff last night?

A. Yes, sir.

Q. And you found the right clavicle five-eighths of

(Testimony of Charles A. Winans.)

an inch shorter? A. Yes, sir.

Q. Now, is it possible with a man of such heavy muscular development about his shoulders as this man has for you to determine with absolute accuracy the length of each of his clavicles?

A. I think so, yes.

Q. You were present, were you not, in Doctor Boyle's office the day before yesterday when yourself and other doctors examined this man?

A. Yes, sir.

Q. You were present when his clavicle was measured at that time? A. Yes, sir.

Q. Is it not a fact that you agreed with Doctor Gross at that time that the difference in length was about a quarter of an inch?

A. I think that is what we made it.

Q. Now, if it is possible to accurately determine the length of these bones, how do you account for the one-quarter of an inch in one measurement and the five-eighths of an inch in the other measurement?

A. These points, they are not as exact as the end of a yardstick; all bones are more or less rounding, wherever there is a joint and there may be a little discrepancy in the measurements at any time, and not another. For instance, I might hold the tapeline I will say at so much and the next man will come along and [136] measure it and I may get one-eighth of an inch more or a quarter or whatever it is—he may vary in his points of measurement.

Q. Now, which of these measurements would you say was correct, a quarter of an inch obtained when

(Testimony of Charles A. Winans.)

four doctors were present or the five-eighths when you measured him alone—there is three-eighths of an inch difference in the measurements?

A. I think Doctor Gross measured it. Did you use the tape-line, Doctor Gross?

Doctor GROSS.—Yes, and apparently it was a quarter of an inch—I think there was something over that a little bit.

Q. And did you make this examination last night by yourself?

A. Yes—there were others present.

Q. No other doctors present?

A. Doctor Boyle, I think, was present.

Q. Did you examine the X-ray picture taken by Doctor Chase along about the 20th of March, last year, 1916, of this man's shoulder?

A. I examined the plate that was said to be taken by Doctor Chase.

Q. From that plate, did you discover any overlapping of the clavicle? A. I could not.

Q. You read the statement that Doctor Chase wrote Mr. Ritchie regarding what he discovered to be the man's condition from his inspection?

A. I do not now remember that I did.

Q. Do you recall now that the doctor said there was a dislocation instead of a fracture?

A. I didn't hear,—I don't think I heard it at all—I don't remember it.

Q. Now, you are quite certain that there was no separation of the bone when this patient called upon you last spring? A. What is the question?

(Testimony of Charles A. Winans.)

Q. You are positive at this time there was no separation of the [137] plaintiff's right clavicle at the seat of fracture when he called upon you last spring? A. I know that it had been broken.

Q. But at that time there was no separation?

A. I can't tell.

Q. You couldn't tell? A. No.

Q. You didn't get any results that would lead you to believe there was a separation, did you?

A. No.

Q. Now, if this plaintiff was able to extend his right hand to his left shoulder, with his arm across his breast, could there have been any separation of the clavicle?

A. That is a little hard to say—would there have been a separation if he had put his hand—

Q. His right hand on his left shoulder, in this position (indicating)?

A. It would be very difficult for him to do.

Q. Isn't that one of the standard tests to determine a fracture of the clavicle?

A. I can't say as to that.

Q. Did you discover in your examination of the defendant the day before yesterday—of the plaintiff, I mean—did you discover any tenderness or soreness in the region of his right clavicle?

A. No.

Q. Can you at this time state any reason from your physical examination of the plaintiff, including an X-ray examination, why he should not now enjoy

(Testimony of Charles A. Winans.)

the full strength and ordinary use of his right arm and shoulder?

A. That is a little hard to say.

Q. Do you discover any disarrangement? [138]

A. No, I cannot.

Whereupon court took a recess to 2 P. M.

AFTERNOON SESSION.

Mr. DONOHUE.—I have no further cross-examination at this time.

Redirect.

(By Mr. RITCHIE.)

Q. In answer to some questions by Mr. Donohue you stated that the correct way to bandage the arm and shoulder in order to have the bone grow together properly was first to hold the elbow up high in the way that you indicated. If that were not done and the arm hung loosely down, what effect, if any, would it have upon a fractured clavicle?

A. The muscles tend to rotate the bone out of position—the tendency is for the fragments to rotate out of position.

Q. So they would not grow together properly?

A. Yes, sir.

Q. The object of the body bandage is to hold the ends of the bone closely together so they will knit?

A. Yes, sir.

Q. There has been considerable inquiry here about a possible operation to correct this supposed malformation in the bone fracture. Will you explain under what circumstances such an operation

(Testimony of Charles A. Winans.)

is performed, that is, what the object of it is?

A. In case a man is suffering too much pain from pressure of the fragment, it might be advisable to cut the bone in two or break it again, and freshen the ends and wire them together—that is, considering it is paining him at that point.

Q. What do you mean by freshen the ends?

A. Either scraping or sawing them off, so there would be a fresh bone surface exposed. [139]

Q. Do the ends of a fractured bone get calloused over? A. They do sometimes.

Q. And in case of an operation, it would be necessary to freshen them, so they would grow together; is that the idea? A. That is the idea.

(By Mr. DONOHOE.)

Q. Assuming that the patient had a fractured clavicle and had his arm bound up in this position (indicating) instead of hanging loose, it would then have a tendency to be in a proper position for the perfect knitting of the bone?

A. It might not be in the proper position, but it would knit quicker if the arm were quiet.

Q. How long does it ordinarily require for a fractured clavicle to knit?

A. That varies with every case,—probably anywhere from three weeks to six weeks. It depends on the conditions.

Q. It may knit in three weeks?

A. I think so.

Q. Now, you say it is advisable to perform an operation in case the patient is suffering too much

(Testimony of Charles A. Winans.)

pain. What do you mean by too much pain?

A. Well, if the fragments were out of alignment badly, they might press on the nerves underneath—the fragment press on any nerve.

Q. Would you say the fragments in the plaintiff's right clavicle are out of alignment to such an extent?

A. I wouldn't say positively that they are, but it is possible they might be.

Q. You wouldn't say positively they are, but possible they might be? A. Yes.

Q. It might be possible that that condition would exist at any [140] time in the union of a fractured clavicle? A. I think so.

Q. Have you seen anything in your examination of the plaintiff's clavicle from which you would be willing to stake your professional reputation that the fragments of this bone are pressing upon the nerves to such an extent as to require an operation?

A. No, sir; I would not say that.

Witness excused.

Mr. RITCHIE.—I will now introduce the statement of Doctor Chase to be admitted as his deposition under stipulation and at the conclusion of the reading, I will offer this as an exhibit—this X-ray picture.

Mr. DONOHUE.—No objection.

The COURT.—You may read the statement.

Mr. Ritchie reads the statement as follows:
(Title of Court and Cause.)

Stipulation as to Testimony of W. H. Chase.

It is hereby stipulated by and between the parties to this action that the following be admitted as the testimony of Dr. W. H. Chase of Cordova, Alaska, in behalf of plaintiff at the trial of this cause, subject to objection for relevancy, materiality and competency under the issues of the cause, to wit:

That said W. H. Chase is a graduate physician in regular practice at Cordova, where he has been in practice for at least eight years; that he was a practicing physician elsewhere prior to coming to Cordova. That he is a licensed physician under the laws of Alaska and was during all the year 1916.
[141]

That on or about March 20, 1916, at Cordova, he took an X-ray photograph of plaintiff's right shoulder, which he dated in his own handwriting and which is offered by plaintiff and admitted by defendant to be the photograph in question. Further, that in his opinion plaintiff's right clavicle was at that time dislocated at its outer articulation and the end of the bone was protruding upward.

Signed by the respective attorneys.

The COURT.—The statement just read will be received by the jury as evidence in the case.

The X-ray referred to in the statement of Doctor Chase is received in evidence, marked Plaintiff's Exhibit "B," and made a part hereof.

Mr. RITCHIE.—We will now call Mr. Attrick.
[142]

Testimony of Dan Attrick, for Plaintiff.

DAN ATTRICK, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. What is your name? A. Dan Attrick.

Q. Where do you live? A. In Valdez.

Q. How long have you lived in Valdez?

A. Probably a month.

Q. Where were you living in January and February, 1916? A. In Allamar.

Q. What were you doing there?

A. Working in the mine.

Q. You are a miner—is that your occupation?

A. Yes.

Q. You were working for the Ellamar Mining Company? A. Yes, sir.

Q. What country are you a native of?

A. Russia.

Q. How long have you lived in the United States?

A. From 1909.

Q. Do you know Tony Possus?

A. Yes, sir; I know him in Ellamar.

Q. How long have you known him?

A. Since 1915.

Q. Do you remember the time when he met with an accident in the mine there, about a year ago?

A. Yes, sir.

Q. Were you working in the mine at the time?

(Testimony of Dan Attrick.)

A. Yes, I worked on the day shift and he on the night shift.

Q. You were not on the night shift? You were not in the mine at [143] the time he was hurt?

A. No.

Q. Did you see him soon after the accident?

A. Yes, sir.

Q. What time after?

A. The next day—four o'clock in the afternoon.

Q. Four o'clock in the afternoon of the day following the night on which he was hurt?

A. Yes, sir.

Q. Where was he at that time?

A. He was lying down in the bed in the hospital.

Q. Was there any other person present when you were there besides himself?

A. Another man and Mrs. Tramontin.

Q. What was Tony doing?

A. He was on the bed.

Q. Was he bandaged up in any way?

A. I forget—he has something on the shoulder; yes, he has a bandage.

Q. Did you see him after that on any other days?

A. Yes, I see him the next day.

Q. Was he still in bed?

A. Yes, he sat down in the bed.

Q. Did you see whether or not he was bandaged at that time? A. I think— Yes.

Q. (By the COURT.) You say "I think."

Q. Do you think he was or think he was not?

A. He has got a bandage on the shoulders.

(Testimony of Dan Attrick.)

Q. You understand what a bandage is—stripes of cloth?

A. Yes, sir, across the shoulders—from the right shoulder to the left.

Q. How much of his body could you see—how far down? [144]

A. I can't see no further than I see the shoulder.

Q. Did you see him nearly every day while he was in the hospital?

A. Yes, I make a visit every day.

Q. Did you see him at any time when he had no bandage on?

A. I guess after five days—I never see a bandage after five or six days.

Q. The first five or six days you think he had a bandage on and after that, he did not?

A. Yes, he had for the first five days.

Q. Do you know when Tony left the hospital—how long it was after his accident?

A. It was probably the 26th or 25th of January.

Q. Did you see him after he left the hospital anywhere?

A. Yes, he was in the bunk-house—I see him pretty near every day, too.

Q. You saw him pretty near every day?

A. Yes.

Q. Do you know how he got his meals at that time?

A. A friend, he bring him his meal from the boarding-house.

Q. When you saw him the first days in the hos-

(Testimony of Dan Attrick.)

pital was Mrs. Tramontin there several times, or more than once?

A. Yes, Mrs. Tramontin make a visit, I guess, eleven o'clock in the morning; sometimes four o'clock in the afternoon.

Q. Did you ever have a talk with her about how Tony was hurt? A. No; she says it is too bad.

Q. Were you ever present in the company office or store when there was—I will change that. Did you ever hear in the company office or store any conversation between Tony Possus and either Mr. Gedney or Mr. Estey? A. Yes.

Q. Just state when that was. [145]

Mr. DONOHOE.—We object to this on the ground that it is incompetent, irrelevant and immaterial testimony.

Objection overruled; defendant allowed an exception.

Q. About how long after Tony left the hospital was that, if you remember? Fix the date if you can. How long after he was hurt was it, as near as you can tell? A. I can't tell exactly.

Q. Was it some time after he left the hospital?

A. I don't know.

Q. Who was present at this conversation that you spoke of? A. Mr. Estey.

Q. Who else?

A. Mr. Estey, and after awhile Mr. Gedney.

Q. And you and Tony were there?

A. Yes, me and Tony and another two men.

(Testimony of Dan Attrick.)

Q. What did they say, if anything, to Tony, and what did Tony say to them?

A. To Mr. Estey?

Q. Yes. Was this in the store?

A. No, in the hospital.

Q. This first conversation you spoke about, was this in the hospital? A. Yes, sir.

Q. Tell what happened there.

Mr. DONOHOE.—We object to that question on the ground that it is incompetent, irrelevant and immaterial and not within the issues joined by the pleadings. It comes back to the proposition of the part of the complaint that was stricken out on our motion in the first complaint and goes to the question of signing a release to the company.

Objection overruled; defendant allowed an exception.

Q. State what conversation took place there.

[146]

The COURT.—Who was present first and when was it? A. Mr. Estey.

Q. Anybody else?

A. After a while came Mr. Gedney—after ten or fifteen minutes came Mr. Gedney.

Q. What was said by Tony and Mr. Estey and Mr. Gedney?

A. Mr. Estey told Tony to sign papers, this paper—it says it was nobody's fault—it is Tony's fault himself. He said I never sign this paper because it is not my fault and Mr. Estey told him, if you not sign this paper, the company charge you for board

(Testimony of Dan Attrick.)

while you were in the hospital and Tony said, I can't help it—that is all.

Q. Did you at any time in the store or office of the company hear any conversation between Tony and either Mr. Gedney or Mr. Estey?

A. No, I did not.

Q. Was that the only time you heard any conversation between Tony and Mr. Estey?

A. Yes, sir—after a while Mr. Estey go and he talk to Mr. Gedney.

Mr. DONOHOE.—We object to any testimony about Mr. Gedney because Mr. Gedney was not in charge of the mine at that time, as shown by the plaintiff's own testimony.

The COURT.—The last part of that answer, regarding Mr. Gedney, may be stricken.

Q. You didn't hear any conversation in the store there or office of the company? A. No.

Cross-examination.

(By Mr. DONOHOE.)

Q. How do you know that those bandages were removed after five days?

A. I don't see any after five days—I don't know who moved them.

Q. You don't know whether he had bandages on after that or not? [147]

A. I never see any after five days.

Q. After five days do you know positively that he had no bandages on him?

A. Yes, I know after five days.

Q. How do you know?

(Testimony of Dan Attrick.)

A. Because I make a visit every day.

Q. Did he have his shirt off?

A. He don't have a shirt on his shoulder; just a coat.

Q. He had no shirt on at all? A. No.

Q. No undershirt? A. No.

Q. Just naked there, with a coat on?

A. Yes, just naked with a coat on.

Q. Was his right arm in a sling?

A. He had a shirt on just one shoulder—he had a shirt on one shoulder.

Q. Is it not a fact that his right arm was in a sling and a coat was thrown over the shoulder and his right arm was held up in this position (indicating)? Is it not a fact that his right arm was held up in that position, with his right hand toward his left shoulder and his arm across his breast?

A. No, I think he had a black coat on one side—it looked like a coat.

Q. How was he carrying his right arm? What position was his right arm in?

A. I don't see his right arm—he have a bandage on.

Q. He had a bandage on the right arm?

A. Yes, after five days he had black on the shoulders.

Q. When you were there five days after he had a bandage on the right arm?

A. I don't understand. [148]

Q. You understood Mr. Ritchie when he was questioning you about bandages—do you know what a

(Testimony of Dan Attrick.)

bandage it? A. No, I don't know.

Q. Then you don't know whether he had a bandage on or not, do you—if you don't know what it is? Can you answer that question? (No answer.)

Q. How do you know it was five days after the accident?

A. He has been in the hospital and I bring to him sometimes cigarettes and sometimes roll cigarettes.

Q. How do you know it was not twenty days after?

A. After twenty days he has been in the bunk-house. I went to his room every day and fixed up his bed and he asked somebody to bring his meals because there was no one to bring his meals in.

Q. Couldn't he walk all right?

A. He can't because his right shoulder—

Q. Because his right shoulder was sore, he couldn't walk? A. He can walk; yes.

Q. Why didn't he go to the mess-house and get his own meals?

A. After twenty days he goes to the cook-house himself and eat.

Q. Why couldn't he go when he left the hospital?

A. In the hospital he gets his meals every day.

Q. When he left the hospital he walked to the bunk-house, didn't he? A. Yes.

Q. And the bunk-house was further from the hospital than the mess-house is from the bunk-house, isn't it—he had to walk further? A. How far?

Q. From the hospital to the bunk-house.

The COURT.—Ask him which is nearer.

Q. Which is nearer to the mess-house, the bunk-

(Testimony of Dan Attrick.)

house or the hospital?

A. From the mess-house to the hospital probably six or seven hundred feet, maybe a thousand feet.

[149]

Q. And from the bunk-house to the mess-house how far?

A. Maybe three hundred feet, maybe two hundred feet.

Q. About 200 ft. from the bunk-house to the mess-house? A. Yes, sir.

Q. Why didn't Tony walk over to the mess-house and get his own meals?

Mr. RITCHIE.—We object to that on the ground that this witness is not supposed to know why he didn't do it.

The COURT.—He may answer if he knows.

Q. You are a countryman of Tony's—you and Tony come from the same country? A. Yes, sir.

Q. Did you know him in Russia?

A. Not yet—Russia a big country.

(By Mr. RITCHIE.)

Q. You stated you did not know what a bandage is. Tell us what Tony did have on his body after four or five days, if anything?

A. Sometimes he have a bandage and sometimes not—I can't tell.

Q. The first time you saw him, did he have white strips of cloth on him?

A. Yes, the first time he had a bandage.

Q. You understand that is what is meant by a bandage?

(Testimony of Dan Attrick.)

A. He had no clothes at all the first day, he had no shirt.

Q. He had them on when you first saw him, the first day or two? A. Yes.

Q. And after four or five days he didn't have them, is that the idea?

A. If I remember right—he first has and afterwards did not.

Q. The first day or two he had the strips on?

A. Yes, sir, and the second and third. [150]

Q. And the second and third—and then afterwards you didn't see them any more—is that the idea?

A. I can't tell, after 5 maybe after ten days—I can't tell because it is a long time.

Q. Before he left the hospital they were taken off, were they? A. I think so.

(By Mr. DONOHOE.)

Q. When did Tony leave Ellamar?

A. I don't know.

Q. Do you remember the Doctor coming down from the Post from Fort Liscum, down to Ellamar?

A. I remember them talking, I don't know what day of the month he has been there.

Q. Do you remember the doctor coming down?

A. I don't remember the day of the month.

Q. You remember he did come down there, some time in February? A. No.

Q. You never saw the doctor from the Post down there, from Fort Liscum, Doctor Duckwall?

A. I see him there, yes, the doctor—I don't know what time he has been there.

(Testimony of Dan Attrick.)

Q. Was Tony staying in the bunk-house when that doctor came down? A. Yes.

Q. Was Tony in the bunk-house at the time that Mr. Gedney got his leg broke? A. Yes, sir.

Q. He was in the bunk-house then?

A. Yes, sir.

Q. How long had he been in the bunk-house?

A. Twelve or thirteen days? [151]

Q. Twelve or thirteen days previous to that?

A. Yes, sir.

Q. What is it that fixes it on your mind as twelve or thirteen days—what makes you remember that?

A. Because the 12th of January he got hurt,—I remember that and he wasn't over 28 days in Ellamar; after 28 days he got discharged.

Q. Then he was at the hospital for twenty-eight days?

A. In the hospital fourteen and the bunk-house thirteen—like that.

Q. How do you know that? What impressed your mind so you know it?

A. I know it because I am working up there.

Q. That is the best explanation you can give of it? A. Yes, sir.

Witness excused.

PLAINTIFF RESTS.

Mr. DONOHUE.—I have a motion to make.

Defendant at this time moves the Court to instruct the jury to return a verdict on plaintiff's second cause of action, in favor of the defendant and against the plaintiff, for the following reasons, to wit:

First: Plaintiff in the second paragraph of his reply to the defendant's affirmative defense to plaintiff's second cause of action admits that the only hospital treatment he knew he would receive in case he was injured, in consideration of the \$1.50 per month deducted from his wages as hospital dues, was as follows: "He knew the defendant had a house equipped as a sort of a crude hospital with a woman in charge of the same. He knew nothing of any further method of caring for the injured [152] employees and never had any conversation with any of the company's officials regarding the deduction of a dollar and a half a month from his wages for hospital dues or what it would entitle him to in case he was injured while in the defendant's employment."

The evidence shows conclusively that so far as he was concerned he received all the hospital care and attention to which he was entitled under his alleged hospital contract.

Second: That the evidence offered by the plaintiff wholly failed to sustain plaintiff's second cause of action.

Third: That the evidence offered by plaintiff in support of his second cause of action is uncertain and indefinite, and from this evidence it is impossible for the jury to determine with any degree of certainty that portion or part of the plaintiff's alleged suffering and pain is, or was, due to the alleged negligence of defendant in not furnishing plaintiff with timely and sufficient surgical care

and medical and hospital services, and what portion or part of plaintiff's alleged suffering and pain was due to the original injury, and any verdict found by the jury in favor of plaintiff on his second cause of action would be purely speculative, as the damage, if any, sustained by plaintiff, under his second cause of action, is entirely too remote and uncertain to be ascertained from the evidence.

Fourth: That the evidence offered by plaintiff in support of his second cause of action is uncertain and indefinite and from the evidence it is impossible for the jury to determine with any degree of certainty the extent, if any, to which the original injury has been aggravated by reason of the alleged negligence of the defendant in not furnishing plaintiff with timely and sufficient surgical care and medical and hospital services, and any verdict found by the jury in favor of plaintiff's [153] second cause of action would be purely speculative, as the damage, if any, sustained by plaintiff under his alleged second cause of action is entirely too remote and uncertain to be ascertained from the evidence.

Fifth: That any damages sustained by plaintiff by reason of the injuries he sustained on the 12th day of January, 1916, or in any manner growing out of said injuries, will be fully compensated by the findings of the jury in plaintiff's first cause of action and to permit plaintiff to recover any damages whatever under his second cause of action would be allowing him to recover twice for the same cause.

Whereupon the jury was excused and argument

(Testimony of L. L. Middlecamp.)

had upon the above motion.

The jury having returned—

By the COURT.—The motion presented by the defendant for an instructed verdict on the second cause of action will be denied and exception allowed defendant.

Mr. DONOHOE.—At this time the defendant moves that the Court grant a nonsuit against the plaintiff on his second cause of action on the same grounds presented in defendant's motion for an instructed verdict.

By the COURT.—This motion will also be denied and exception allowed.

Mr. DONOHOE.—We will call Mr. Middlecamp.
[154]

DEFENSE.

Testimony of L. L. Middlecamp, for Defendant.

L. L. MIDDLECAMP, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. DONOHOE.)

Q. What is your name? A. L. L. Middlecamp.

Q. Where do you reside? A. Ellamar.

Q. What position do you occupy with the defendant company? A. Superintendent.

Q. Are you in charge of the operations of the company at Ellamar now? A. Yes, sir, now.

Q. How long have you been in that position?

A. Nine years.

Q. You are acquainted with the plaintiff in this

(Testimony of L. L. Middlecamp.)

action? A. Yes, sir, I am.

Q. You have a number of men employed in the mining operations of the company? A. Yes, sir.

Q. And has it been the custom of the company to deduct \$1.50 a month for hospital services?

A. Yes, sir.

Q. Just state what were the rules and customs of the company on the 12th day of January, 1916, and for several years prior thereto as to the hospital service you gave the employees.

A. In case of accident—

Mr. RITCHIE.—We object to “several years prior thereto.”

Objection overruled; plaintiff allowed an exception to the ruling.

A. (Continued.) Minor accidents, accidents of small consequence, were [155] treated there; ones that were serious were sent to Valdez, weather permitting.

Q. And those sent to Valdez—

A. We gave them to some local doctor.

Q. Some local doctor took care of them?

A. Yes, generally the one with a hospital.

Q. Was this custom generally known to all the employees during the year 1915 and up to January 12, 1916? A. Yes, sir.

Q. Was that the general custom of the mine during all of the time that the plaintiff in this action was in the employ of the company? A. Yes, sir.

Mr. RITCHIE.—We object to a general custom without showing a contract.

(Testimony of L. L. Middlecamp.)

The COURT.—The question is answered.

Mr. RITCHIE.—We move to strike it.

Motion denied; plaintiff allowed an exception.

Q. What arrangements did you have at the mine for treating employees who were slightly injured and giving first aid in a case of a serious nature?

A. The last couple of years or so we equipped a little tent right near Mrs. Tramontin's house, where she had bandages and different kinds of liniments and splints and a couple of beds, fitted up as a sort of first-aid hospital.

Q. Did you, along about January, 1916, have a better establishment, a better equipped establishment than that for the purpose of giving first-aid for minor injuries?

A. February or January?

Q. January.

A. We had the same building as for the summer time, but the weather was so severe we went to another building and we moved these [156] things over to the old hospital building; it was a warmer building—that was the only reason. It wasn't quite so convenient for the nurse but was a better constructed building and much better to use for the winter-time and the tent for the summer-time.

Q. How long previous to the 12th day of January, 1916, was it, since the company had a resident physician there, and surgeon?

A. The spring of 1908 it discontinued the hospital service.

Q. The spring of 1908? A. Yes, sir.

(Testimony of L. L. Middlecamp.)

Q. And from 1908 up until February, 1916, you had no resident physician at the mine? A. No, sir.

Q. And was it generally known in and about your mining works and by employees that you did not have a physician there?

A. Yes, I think it was.

Q. Now, this temporary hospital that you had in the winter of 1915 and 16, describe how it was equipped as to comfort or otherwise?

A. Well, as I said in the summer-time we had it in this tent because it was more convenient for the nurse. In the winter-time we had it in the old hospital building, on account of its being a better building and warmer. They were both equipped with hospital couches and different kinds of liniments, bandages, adhesive plasters, etc., to take care of minor accidents and injuries.

Q. Were the buildings both heated?

A. Yes, stoves in both buildings.

Q. Did you during the eight months previous to the 12th day of January, 1916, treat employees who were slightly injured at Ellamar?

A. Yes, we did.

Q. How many had you treated? [157]

A. A good many—I don't know how many, but a good many.

Q. On the 12th day of January, 1916, where were you? A. Los Angeles.

Q. You were temporarily absent from the mine?

A. Yes, sir.

Q. When did you return?

(Testimony of L. L. Middlecamp.)

A. The 19th of February, 1916.

Q. While out that winter, did you employ a competent physician and surgeon to attend upon the hospital at Ellamar, to open up the hospital at Ellamar?

Mr. RITCHIE.—We object as irrelevant, for the reason that this competent surgeon was not here at the time this accident occurred.

The COURT.—The objection will be overruled—you may cross-examine.

Plaintiff allowed an exception to the ruling.

A. Yes, sir.

Q. And when did he arrive at Ellamar, and open up the hospital for the reception of injured employees of the mine, and other people needing service?

A. He arrived on the 19th of February and immediately got the hospital in shape and had an operation on the 21st, I think, or 22d.

Mr. RITCHIE.—We move to strike that as irrelevant.

The COURT.—The testimony as to what was done subsequent to January 12th and subsequent to the time that the plaintiff left Ellamar can be received by the jury only as directed to the second cause of action and that particularly on the point as to negligence on the part of the company in affording a means to take care of the plaintiff at such a time thereafter as he may [158] have needed treatment and at such a time as being advised that he needed treatment, they offered to give him treatment; in other

(Testimony of L. L. Middlecamp.)

words, going to a question which the Court will have to instruct the jury upon, as to how far his action may constitute, that is the plaintiff's action, may constitute negligence on his part in accepting or failing to accept services that were offered. The motion to strike will be denied and exception allowed.

Q. When you opened this hospital on or about the 19th or 20th of February, 1916, just describe whether it was equipped with surgical apparatus, including an X-ray and other necessary apparatus?

Mr. RITCHIE.—Describe what it did contain.

Q. What did your hospital contain when you opened it up there, with the Doctor present, on February 20, 1916?

Mr. RITCHIE.—It is understood that all of this goes in under the same objection and exception?

The COURT.—Yes.

A. We started in with what we had to start in with, but while I was in Seattle, we purchased an X-ray machine, but it was several boats before the machine got there, and we purchased sterilizers and instruments and all that sort of thing, but it was a few boats before all this equipment arrived and we got it in shape, but within thirty days or six weeks all this equipment reached there and we had a first-class hospital, containing the X-ray machine and sterilizer, and the instruments we purchased in Seattle, and besides Doctor Gross' personal instruments, and we had two hospital beds in this hospital to take care of the sick and injured, and it was heated by a good stove, and running water, and I think compared fav-

(Testimony of L. L. Middlecamp.)

orably with any hospital around this part of the country. [159]

Q. You spoke a moment ago of Mrs. Tramontin—just state who she was, and in what capacity she was working for the company.

A. Mrs. Tramontin was the wife of one of my shift bosses and I later found out that she had seen considerable service as a nurse with the Treadwell Mining Company, and we one time and then another got sending her some minor cases, which she handled very satisfactorily to us.

Q. When you arrived at Ellamar about the 19th of February, 1916, did you see anything of the plaintiff around there anywhere? A. I did not.

Q. When did you first learn that the plaintiff was claiming that the company owed him some money for damages or compensation?

A. I got a letter from Mr. Ritchie along in April sometime—I will take that back, I think Mr. Ritchie saw me personally and talked it over on the street regarding the man having come to see him—I don't know what date that was, though.

Q. Some time in April you received a letter from Mr. Ritchie on the subject, did you? A. Yes, sir.

Q. As attorney for the plaintiff? A. Yes, sir.

Q. And what response did you make to that letter, if any?

A. I wrote Mr. Ritchie a letter and told him I had sent you the letter and instructed you to answer it, as our attorney.

Mr. DONOHOE.—We desire to offer this letter in

evidence (handing to Mr. Ritchie).

The letter is admitted, without objection, marked Defendant's Exhibit No. 1 and read to the jury by Mr. Bonnifield as follows:

Defendant's Exhibit No. 1—Letter, Dated April 22, 1916, from Messrs. Donohoe & Dimond to Messrs. Lyons & Ritchie.

Valdez, Alaska, April 22, 1916.

Messrs. Lyons & Ritchie,

Valdez, Alaska. [160]

Gentlemen:

Mr. L. L. Middlecamp, for the Ellamar Mining Company of Alaska has called our attention to your letter to him of recent date in which you call to the attention of the Company the claim of Tony Passos, or Tony Passiu, or Tony Passu, against it for compensation for an injury to the latter while in the employ of the Company at its mine at Ellamar, Alaska.

Mr. Middlecamp states that the Company has a physician and a surgeon in its employ at Ellamar, Alaska, authorized to practice medicine under the laws of the Territory of Alaska, and that the Company wishes to have an examination of your client made by such physician. The Company, therefore, requests Mr. Passos that he submit himself to examination by the Company's said physician at Ellamar, Alaska, forthwith, and the Company will pay and advance to him upon demand at our office the necessary transportation charges and expenses from Valdez to Ellamar and return, or will furnish such transportation. The Company, of course, cannot pay any transportation charges or any expenses

(Testimony of L. L. Middlecamp.)

whatsoever for any other surgeon or physician who may desire, or whom Mr. Passos may desire, to be present at such examination.

If, upon such examination, it is found that Mr. Passos is suffering from any physical injury incurred in his employment by it at Ellamar, Alaska, the Company is willing to give proper treatment for such injuries. It is obviously impossible to make any settlement until such examination has been made as is herein requested.

Your respectfully,

(Signed) DONOHOE & DIMOND,

By ANTHONY J. DIMOND.

Q. Did the plaintiff go to Ellamar for that examination?

A. Not in response to that letter.

The COURT.—Is the letter dated?

Mr. BONNIFIELD.—Yes, sir, April 22, 1916.

Mr. DONOHOE.—Mr. Ritchie, you acknowledge receiving that letter and indicating the contents to Mr. Passus?

Mr. RITCHIE.—Yes, sir.

Q. Now, later on, did anything come up that you know of regarding a further demand on this plaintiff to submit to any examination or to come down for hospital treatment?

A. Yes, in another letter you wrote to Mr. Ritchie you made a demand for him to submit to an examination.

Mr. DONOHOE.—We ask that this letter, dated Valdez, Alaska, August 22, 1916, addressed to Tony Passus of Valdez, Alaska, and Messrs. [161]

(Testimony of L. L. Middlecamp.)

Lyons & Ritchie, of Valdez, Alaska, his attorneys, be admitted in evidence and marked Defendant's Exhibit No. 2. (Handing paper to Mr. Ritchie.)

There being no objection the letter was admitted in evidence, marked Defendant's Exhibit No. 2, and read to the jury by Mr. Bonnifield, as follows:

Defendant's Exhibit No. 2—Letter, Dated August 22, 1916, from Ellamar Mining Co., to Tony Possus.

Valdez, Alaska, August 22, 1916.

To Mr. Tony Possus of Valdez, Alaska, and Messrs.

Lyons & Ritchie of Valdez, Alaska, His Attorneys:

Gentlemen:

In regard to your claim against the Ellamar Mining Company of Alaska for personal injuries, which you claim to have received while in the employ of this Company, and which you claim resulted in the fracture of your clavicle, we call your attention to the fact that some time ago the Ellamar Mining Company requested you to submit to an X-ray examination of your shoulder for the purpose of ascertaining whether your clavicle was really fractured or not, and that you have failed to do so.

The Ellamar Mining Company of Alaska at this time informs you that it now maintains at Ellamar, Alaska, a first-class hospital, equipped with all modern surgical appliances, including an X-ray, and has in attendance a first-class physician and surgeon.

The Company now makes you the following offer: It will either take you in the Company's launch, or

(Testimony of L. L. Middlecamp.)

pay your transportation from Valdez to Ellamar, at which place the Company's surgeon will make an X-ray examination of that portion of your clavicle you claim has been broken, and make a general and thorough physical examination of you, and perform any necessary operation for the purpose of correcting and healing any fracture of your clavicle, if such exists, and will furnish you with first-class hospital accommodations for the operation and until you are discharged as cured by the Company's physician and surgeon. In other words, it will furnish you free transportation to Ellamar, hospital accommodations and physician and surgeon for an examination, operation, if necessary, and until you have entirely recovered. The Company will also settle such claims in cash as you may be entitled to during the time you have been disabled under the provisions of Chapter 71 of the Session Laws of the Alaska Legislature of the year 1915.

Please let the Company know at as early a date as possible whether you accept or reject this offer.

(Signed) ELLAMAR MINING COMPANY,

By DONOHOE & DIMOND,

Its Attorneys. [162]

Mr. DONOHOE.—You admit that this was received by you and the plaintiff received it, Mr. Ritchie?

Mr. RITCHIE.—Yes—and I told the plaintiff the substance of it as near as I could.

Q. Did the plaintiff, in response to that last letter, go to Ellamar?

A. Yes, sir; he came to Ellamar.

(Testimony of L. L. Middlecamp.)

Q. Was he examined by Doctor Gross, the company's physician? A. He was.

Q. Did you have a conversation with him afterwards? A. Yes, I did.

Q. Just state that conversation as near as you can remember it.

A. Why, I asked him if he didn't want to remain in Ellamar and submit to this treatment, this massage, massaging, that Doctor Gross had offered him. He didn't seem to say anything; he seemed to be very eager to get some money, said he would make a complete settlement for two thousand dollars and I told him that we would be willing to have him stay at Ellamar and give him free treatment and take care of him in every way we could, without any charges, but we couldn't make a settlement of that kind, and he didn't say Yes or No about it, but he left on the boat that called in that afternoon.

Q. Has he been to Ellamar since?

A. He has not, to my knowledge.

Q. There was no further demands made upon you until this suit was brought? A. No.

Mr. DONOHOE.—That is all. [163]

Cross-examination.

(By Mr. RITCHIE.)

Q. Who was the judge of whether a case was serious or not?

A. Well we had the nurse there and we kinder leave it up to her judgment and my judgment too whether we thought it was serious, if I was there.

Q. There was no person in Ellamar during this

(Testimony of L. L. Middlecamp.)

time until Doctor Gross came there who knew any more about medicine or surgery than Mrs. Tramon-tin? A. Not to my knowledge.

Q. She had had some experience you say as a nurse and had some knowledge of physical injuries?

A. She had.

Q. Did anybody else know any more than she did or as much as she did?

A. Not to my knowledge.

Q. So if a man was injured quite seriously, but it was not visible or plain to inspection, even on complete inspection, such as an internal injury, for instance, there was no expert there to tell whether he was getting the kind of treatment he ought to have or not?

A. If there was any question about it, we wouldn't decide it but would bring it to Valdez. We didn't know about Westbrook's fracture until we got him to town, but we didn't want to take any chances about it.

Q. Is it not true that you didn't start for Valdez with him until twenty-four hours after he was hurt?

A. I can't say, I don't really remember; I know we got ready as soon as we could.

Q. Wasn't he hurt during the night time and you didn't start to Valdez with him until the next afternoon?

A. I think we started the next morning, I am not sure—I am very [164] sure it was in the morning, but I don't know how many hours it was. There is this much about it, we got ready as soon as we could.

Q. If there was a serious injury, if it was not visi-

(Testimony of L. L. Middlecamp.)

ble to the ordinary person not versed in medicine and surgery, a man might be kept there for days without anybody knowing that something more could be done for him, under your plan—isn't that true?

A. It is possible.

Q. That was the situation in the case of the plaintiff, if he really was suffering from a fractured bone then, there was no attempt made for a good many weeks to have the surgeon examine him to find out whether there was such a fracture?

A. I was not there,—I can't say what they did.

Q. How many men have been working at Ellamar most of the time the last year, during 1916?

A. From 85 to 100.

Q. Do you know how many were there in January, 1916? A. Probably 80 to 85, I should think.

Q. These communications with Mr. Possus were through me—you had no conversation with him yourself except this time in Ellamar?

A. I passed the time of day with him on the street here.

Q. That is the only time you talked to him about his case? A. Yes, sir.

Q. And did he give any reason at all for not going to the hospital there? A. No to me.

Q. He doesn't talk English very well, does he?

A. Not very well, no, but I could talk to him all right.

Q. It is rather difficult to understand him and make him understand very often, unless you repeat your questions two or three [165] different ways?

A. Except the very simple things things he is ac-

(Testimony of L. L. Middlecamp.)

customed to, in his work, etc.

Q. He has a very limited English vocabulary?

A. Yes, sir.

Q. As long as you confine yourself to the small words, he understands—you have no difficulty?

A. No.

Q. But when you get a strange word into the conversation he is at sea? A. Yes, sir.

Q. So it was not possible for you to have any general talk with him at that time?

A. I think we made ourselves understood.

Q. He didn't give any positive reason then why he didn't want to go to the hospital?

A. He did not, no, not to me.

Q. Did he refuse or simply, just simply, refrain from saying anything?

A. He didn't say much of anything.

(By Mr. DONOHOE.)

Q. At the time the plaintiff was at Ellamar was Mr. Gedney or Mr. Estey working for the company then? A. Yes, sir, both of them.

Q. Were they both present when he came down?

A. I thought you meant in February.

Q. No; the time you had this conversation at the end of August—was Mr. Gedney or Mr. Estey working for the company then?

A. No, neither one of them at that time.

Q. How long had Mr. Estey been away from there?
[166]

A. Mr. Estey left in June some time and Mr. Gedney left in October, but Mr. Gedney had been hurt—

(Testimony of L. L. Middlecamp.)

he was around there, I think, but he wasn't working for the company.

Q. Mr. Ritchie has asked you when you brought injured employees to Valdez in case of serious illness—I will ask you if your method of taking care of your injured employees is not the general method that is adopted at all mining camps in and about Prince Williams Sound?

Mr. RITCHIE.—Any reference to the customs of mining companies generally was stricken out at the defendant's request and I object to it on that ground.

Objection sustained; defendant allowed an exception.

Mr. RITCHIE.—In order to make this point in the record I want to ask a few more questions on the same line.

The COURT.—Very well.

Q. Do you know what the custom is at the Granite Mine for taking care of its injured employees?

Mr. RITCHIE.—We object to the question as not within the issues.

The COURT.—Objection will be sustained unless it is preliminary to showing that the plaintiff knew the custom at the Granite Mine.

Mr. DONOHOE.—I don't think we can prove that.

Objection sustained; defendant allowed an exception.

Q. Do you know of any mining camp in or about Prince Williams Sound, in January, 1916, that had at that mining camp a resident physician and surgeon, other than the Latouche mine?

Mr. RITCHIE.—We object as incompetent, irrele-

(Testimony of L. L. Middlecamp.)

vant and immaterial, and not based upon any issues of the case.

Objection sustained; defendant allowed an exception.

(By Mr. RITCHIE.)

Q. What was the precise authority of Mr. Estey and Mr. Gedney [167] respectively in January and February, 1916?

A. Mr. Gedney was foreman and Mr. Estey was bookkeeper and acting as a sort of assistant in my absence—it would really be under Mr. Estey's authority to handle a case of this kind, if I were not there.

Q. Mr. Gedney was at the head of mining operations?

A. Yes, sir, mining operations or getting out the ore underground would be under Mr. Gedney.

Q. The miners were accustomed to take orders from him? A. Yes, on shift they were.

Q. Wouldn't they naturally take orders from him about anything, even off shift, the same as they would any other foreman at any other mine? A. Yes.

Witness excused. [168]

Testimony of Mrs. S. A. Tramontin, for Defendant.

Mrs. S. A. TRAMONTIN, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. DONOHOE.)

Q. What is your name?

A. Mrs. S. A. Tramontin.

Q. Are you acquainted with Mr. Middlecamp, the

(Testimony of Mrs. S. A. Tramontin.)

superintendent of the Ellamar Mining Company?

A. Yes, sir.

Q. Were you acquainted with him during the year 1915 and 1916? A. Yes, sir.

Q. You were residing at Ellamar on the 12th day of January, 1916? A. Yes.

Q. How long had you resided there previous to that date? A. Three years.

Q. You are acquainted with Tony Possus, the plaintiff in this case? A. Yes.

Q. Are you an experienced nurse?

A. Yes, sir.

Q. Did you have any experience or training as a nurse in Europe? A. Yes, for four years.

Q. Where? A. In Venice.

Q. You are a native of Italy? A. Yes, sir.

Q. How long did you have training in Venice?

A. Four years.

Q. Did you have any surgical experience?

A. Yes, sir.

Q. For how long? A. About four years.

Q. Was this a regular hospital where you had this experience? [169] A. Yes.

Q. You didn't graduate from there, did you?

A. Just before I graduated I was married.

Q. You married and didn't stay? A. Yes, sir.

Q. What was the course—how many years was the course?

A. It was about two years—four years' course in the hospital; four years I stay in Venice in the hos-

(Testimony of Mrs. S. A. Tramontin.)

pital and two years I have the course—two years for a trained nurse.

Q. That is, six years you had to put in altogether to get your certificate? A. Yes, sir.

Q. When did you first come to Alaska?

A. I went to Treadwell, Alaska, in the St. Ann Hospital, to attend to the surgical operations with Dr. C. Cole and J. F. Moore.

Q. How long were you there?

A. Fourteen years.

Q. Working in the St. Ann Hospital at Douglass?

A. For the patients there and at Treadwell.

Q. Did you have some considerable experience as a surgical nurse? A. Yes.

Q. Did this St. Ann's Hospital while you were there treat and take care of all the injured employees from the Treadwell mine?

A. Yes, sir; that is, all there was.

Q. Now, from the experience you have had as a surgical nurse, are you capable of taking care of minor injuries to a person? A. Yes.

Q. You were in Ellamar about three years, were you? A. About three years and six months.

Q. When did you leave Ellamar?

A. I left Ellamar about the 15th of September, 1916. [170]

Q. Last September? A. Yes.

Q. At this time you are not in any manner employed by the Ellamar Mining Company?

A. No, after I went away from there.

Q. Now, during these three years in Ellamar, did

(Testimony of Mrs. S. A. Tramontin.)

you take care of any injured employees of the company?

A. Yes, I took care of them all, and I take them to Valdez to Doctor Dalton, to the doctor in Valdez.

Q. Sometimes you made a trip to Valdez with the patients?

A. Yes, I made the trip with all the boys.

Q. If the patient was seriously injured, what did you do down there?

A. I took them to the doctor up here, to Doctor Dalton, to have all the operations.

Q. In case of a serious injury, you administered first-aid down there, did you? A. Yes, sir.

Q. Bandaged them up?

A. Bandaged them up and took good care of them until I reached the doctor.

Q. And you came right with them on the boat?

A. Yes, I never lost a one yet.

Q. Did you take care of any of the employees who were slightly injured at Ellamar, those that were only injured a little? A. Yes.

Q. Do you know of the plaintiff being injured on the 12th day of January, 1916?

A. Yes, sir; about five minutes after he got injured I went up and gave him a good cleaning and put in six stitches in his forehead.

Q. After he was injured he was brought to the hospital? A. Yes, right away. [171]

Q. And what injuries were noticeable when he was brought to the hospital?

A. First I thought he was only bruised; he com-

(Testimony of Mrs. S. A. Tramontin.)

plained of a bruise on the shoulder and a little cut in the forehead, on the left side.

Q. Point out the place where the bruise was on the shoulder? A. It was right here (indicating).

Q. And he had a cut over his left eye?

A. Yes, sir, he had a cut over his left eye.

Q. What did you do in regard to the cut over his left eye?

A. I cleaned it and sterilized it and give it stitches.

Q. How many stitches did you put in that cut?

A. Six.

Q. Was there any bruise on his jaw?

A. No, I didn't see anything.

Q. Did he complain to you of any bruise on his jaw?

A. No; only the forehead I know *on* and a little lump on the side.

Q. Did he complain to you of having a couple of teeth broken out? A. Not to me.

Q. What did you do about bandaging his arm up or his shoulder?

A. I bandaged it with adhesive plaster for three weeks.

Q. You had him bandaged with adhesive plaster for three weeks?

A. Yes, sir—and then they called Doctor Duck-wall.

Q. You bandaged him up that first night he was brought to the hospital? A. Yes.

Q. Did you bandage him so as to hold his arm up in this position?

(Testimony of Mrs. S. A. Tramontin.)

Mr. RITCHIE.—We object to that as leading.

Q. How did you bandage him ?

A. Just like that—so it was steady, for three weeks, and rubbed [172] him with liniment every day, twice a day.

Q. Did the plaintiff have any difficulty in seeing after you dressed up his eye—was the sight bad?

A. The sight of his eye?

Q. Yes.

A. He says after four or five days he feel all right and I didn't give him any pain and in ten days I took the stitches out and it was fine—he didn't complain of his eye.

Q. Was there anything wrong with his jaw?

A. He never told me anything about his jaw?

Q. Did he eat his meals pretty regularly?

A. Yes, three times a day.

Q. What did those meals consist of, what kind of food?

A. After he was brought to the hospital, anything he felt like eating—I asked him what he wants to eat.

Q. What did he eat after a day or so—what kind of food did he eat?

A. Soup and some kind of fruit—he ate more when he got up from bed, he couldn't eat much in bed.

Q. How long was he in bed?

A. About a week.

Q. After he got out of bed, at the end of a week, did he eat ordinary meals?

(Testimony of Mrs. S. A. Tramontin.)

A. Yes, he eat nearly everything.

Q. Did he eat beef steak?

Mr. RITCHIE.—We object as leading.

Q. What did he eat at his meals after he got out of bed at the end of the first week?

A. He eat soup and steak and fried eggs, something like that—everything he likes, because his stomach was all right.

Q. Did he complain that his jaw hurt him?

A. Not to me—he say nothing to me about his jaw.

[173]

Q. Did you and he have a conversation in which—

Mr. RITCHIE.—We object to that as leading.

Mr. DONOHUE.—It is that impeaching question—

Q. Did you and the plaintiff have a conversation in the hospital between the 12th of January and the 20th of January, 1916, at Ellamar, you and he being present and none other, in which the conversation was about as follows: You asked Tony if he wanted to go to Valdez and see a doctor and he said, “No; you done fine with the other boys; I don’t see why you can’t fix me up”?

A. Yes, sir; that is all he said to me.

Q. That conversation took place, did it?

A. Yes, that is all he said.

Q. Was that after he got out of bed or before?

A. After—well, it was about a week after his accident.

Q. About a week after he was injured?

A. Yes, sir.

(Testimony of Mrs. S. A. Tramontin.)

Q. Did he ever at any time complain to you about the treatment he was getting?

A. No, he never say nothing to me, only the shoulder.

Q. Did he ever at any time say to you he wanted a doctor to examine him?

A. No, he never said that to me—I tell the doctor to come and examine him.

Q. How long did the plaintiff stay in the hospital?

A. Three weeks.

Q. And did you take care of him all that time?

A. Took care of him twice a day all the time—dressed him twice a day.

Q. How long was it after he went to the hospital that he was able to dress himself, put on his clothes, if at all?

A. He went to the bunk-house after three weeks.

Q. Up to that time, you had his right arm bandaged up? [174]

A. Yes,—after that time he went to the bunk-house, after the doctor examined him.

Q. How come Tony to go to the bunk-house and leave the hospital?

A. Because there was another man injured there and we had to operate—Doctor Duckwall had an operation there so he went to the bunk-house because he said he was getting well.

Q. Did anyone tell the plaintiff to go to the bunk-house or get out of the hospital?

Mr. RITCHIE.—We object to that for the obvious reason that unless she was there and awake

(Testimony of Mrs. S. A. Tramontin.)

constantly, twenty-four hours in each day, she couldn't know about it.

Mr. DONOHOE.—I will reform it—

Q. Did you hear anyone tell the plaintiff to get out of the hospital?

Mr. RITCHIE.—We object to that as incompetent.

The COURT.—That goes to its weight rather than its competency—the objection will be overruled.

Plaintiff allowed an exception to the ruling.

A. Well, I don't hear anything, no—just Mr. Gedney and Mr. Estey talking together—I heard the two, I heard Mr. Gedney and Mr. Estey, he says, “Doctor Duckwall says he is well; he says there is no use to keep him here”; that is all he said.

Q. That conversation took place after he had left the hospital?

A. After, yes, after he was out of the hospital.

Q. The question I am asking you is this—did you, while the plaintiff was in the hospital, hear anyone tell him to get out of the hospital?

Mr. RITCHIE.—We object to that for the reasons stated before.

Objection overruled; plaintiff allowed an exception.

A. No, I don't hear that myself; I don't know if he said it to him; I didn't hear. [175]

Q. Did he tell you why he was leaving the hospital and going to the bunk-house?

A. No, he said Mr. Estey, he called him in to go to the bunk-house because he had the other patient

(Testimony of Mrs. S. A. Tramontin.)

there to operate upon in that same room.

Q. Do you remember Doctor Duckwall coming down to Ellamar? A. Yes, sir.

Q. And did you see the doctor, Doctor Duckwall, examine the plaintiff?

A. Yes, sir—I told Dr. Duckwall about Tony Possus and Doctor Duckwall examined him and said he couldn't find anything.

Q. Where did this examination take place—where was it? A. In the hospital.

Q. Were you present? A. I was present; yes.

Q. Did Dr. Duckwall require the plaintiff to take off his clothing down to his waist line?

A. Yes, sir.

Q. And how did he proceed to examine him?

A. Why, he examined him for his shoulder.

Q. What did he make him do?

A. He make him do that way and the other way (indicating)—of course I can't do it because I have my clothes on and he has to go to this side and then to the other and this way (indicating) three times and Doctor Duckwall says, "That is all"; he says, "You are all right."

Q. Did the plaintiff have trouble in putting his right hand up here this way (indicating) when he was examined?

A. The doctor says—of course I don't know, there was a doctor there— (Answer stricken out as not responsive.)

Q. Did the plaintiff Tony have any trouble in putting his right hand [176] up on top of his head?

(Testimony of Mrs. S. A. Tramontin.)

A. Well, I don't see any—I don't know.

Q. Did he complain of any pain when he did that?

A. No, he didn't say he had pain.

Q. And he made him put his right hand on his left shoulder? A. Yes, sir.

Q. And his left hand on his right shoulder?

A. Yes, and Doctor Duckwall put a mark how far the hand went on a book—that is all I know.

Q. And he made him extend his two arms out in front of him?

A. Yes, sir; that way (indicating).

Q. And measured the lengths? A. Yes, sir.

Q. And made him do the same thing behind him?

A. Yes, sir.

Q. And what did Doctor Duckwall say in your presence to the plaintiff after he made this examination?

A. Well, he said, "This man is all right"—I had nothing to do after, I never said anything when the doctor said that way.

Q. Did the plaintiff, Tony, at any time while in the hospital and while you were treating him, complain of any broken bones or a broken clavicle?

A. No, when he says about his side, his shoulder, he was complaining it was sore.

Q. The shoulder was sore? A. Yes, sir.

Mr. DONOHOE.—That is all.

Cross-examination.

(By Mr. RITCHIE.)

Q. You are sure that Tony was in the hospital for three weeks after [177] he was hurt?

(Testimony of Mrs. S. A. Tramontin.)

A. Yes, sir.

Q. You kept a record?

A. I kept a record, yes—three weeks.

Q. And he went out of the hospital when Doctor Duckwall came down there to treat another man?

A. Yes, one day before, because a man got injured like to-day and Doctor Duckwall came the next morning.

Q. And did he come back to the hospital to stay after that?

A. No, he stayed at the bunk-house.

Q. At the time he was brought to the hospital, you made the first examination of him, yourself?

A. Yes, sir.

Q. You were called in yourself? A. Yes, sir.

Q. Was he conscious then or unconscious?

A. No, he was only scared, not unconscious at all, just afraid.

Q. He was conscious of what was going on around him? A. No, I never seen him unconscious.

Q. Did he have his senses?

A. Yes, he had his senses; oh, yes.

Q. He could see and hear and talk to you?

A. Yes, sir, he talked to me; he said, "Am I hurt very bad?" and I said, "Not very bad; you will be all right."

Q. Tony doesn't talk much?

A. No, he don't talk plain English—some words he can talk.

Q. He is not inclined to talk much at any time?

A. No, he don't talk much—he always kept quiet.

(Testimony of Mrs. S. A. Tramontin.)

Q. He says very little unless somebody talks to him and asks him questions? A. Yes. [178]

Q. And that night, in fixing him up, did you ask him questions as to where he felt pain or anything of that kind?

A. No, because he was kind of sleepy, so I leave him quiet.

Q. When you were fixing him up, did you put a bandage on him that night?

A. Yes, and the stitches, and put him to bed.

Q. Did you ask him then, at that time, whether he was suffering any pain or where?

A. Yes, he said—he always complained of his shoulder.

Q. It was in the shoulder that made him the most trouble?

A. Yes, sir, the shoulder made him the most trouble.

Q. Did he try to point out where it hurt him?

A. Yes, sir.

Q. And what was your impression of the injury at that time?

A. I thought he was only bruised at first.

Q. What was the appearance of the shoulder, was it discolored in any way? A. Yes, it was black.

Q. How large a spot?

A. A large spot, here (indicating).

Q. Near the point of the shoulder, pretty well up to the middle? A. Yes.

Q. And how wide was it discolored?

(Testimony of Mrs. S. A. Tramontin.)

A. Well, it was about four or five inches, about that much.

Q. Four or five inches long and how wide?

A. About two inches wide.

Q. The whole upper part, nearly the whole upper part of the shoulder was black and blue?

A. Yes, this side, the front and back.

Q. Was it swollen any? [179]

A. Not swollen; just black.

Q. Do you know how long this was after he was hurt? A. It stayed that way two weeks.

Q. When you first got hold of him, how long was it since he was hurt, did the men tell you?

A. When he was brought to the hospital?

Q. Yes—did the men who brought him say how long it was since he was hurt?

A. Ten or fifteen minutes—ten minutes.

Q. You put a bandage on that night?

A. Yes, sir, in the night.

Q. And bound up his right elbow? A. Yes, sir.

Q. Why did you do that?

A. Because I thought maybe rubbing him with liniment, if he is sore in his muscles, I thought maybe it would be all right.

Q. Did you feel his shoulder carefully especially on top, to see whether there was any bone broken?

A. I don't find any—I couldn't notice any bone at the time.

Q. You tried? A. Yes, sir, I tried.

Q. And it was your opinion there was no bone broken? A. I think so; yes.

(Testimony of Mrs. S. A. Tramontin.)

Q. Why did you bind up the elbow that way—that is, bind up the arm from the elbow? Did you think there was a strained muscle?

A. I thought there was a strained muscle and to rub it with the liniment and keep him still that way, maybe it would be all right, maybe it would be better.

Q. At that time you were of the opinion that there was no bone broken at all?

A. Yes, that is what I thought.

Q. When did you change that bandage? [180]

A. Every three or four days.

Q. You kept the same kind of a bandage on him constantly? A. I change it all the time.

Q. The same kind? A. The same kind; yes.

Q. You kept the arm bound up that way?

A. Yes, sir.

Q. And put adhesive plaster in strips on him?

A. Yes, sir.

Q. Whereabouts did you put them on his body? Did you put just enough of them to hold the bandage in place?

A. To keep the bones all right after the liniment.

Q. To keep the bones of the shoulder all right?

A. Yes, sir.

Q. In case there was a fracture? A. Yes, sir.

Q. You were not certain whether there was or not?

A. I didn't know—I asked the doctor was there and the doctor said he thought it was good.

Q. What was the object of those strips of plaster?

A. The surgeons always used them.

(Testimony of Mrs. S. A. Tramontin.)

Q. What is the object of putting those strips of plaster on?

A. To keep the bone kinder straight—if he move it don't hurt the bones that way.

Q. Sometimes when they put a tight bandage on a person, they put strips of this adhesive plaster over it to hold the bandage in a tight position?

A. Yes.

Q. Was there any other object than that in this case—did the plaster itself have some object in holding things in place or [181] was it only put on to hold the cloth bandage in place?

A. No, to keep the arm still for a while.

Q. You only took the bandage off finally just before he left the hospital?

A. That is all and after he left the hospital, he comes two or three times and I rub him with liniment too.

Q. Would you leave it off sometimes two or three hours or put a new bandage on immediately after taking it off?

A. I take it off and put on a new one.

Q. How long did he stay in bed? A. One week.

Q. And then after that did he sit up every day?

A. Yes.

Q. And walk around?

A. And walk around the hospital there.

Q. He staid in the hospital all the time?

A. Yes, sir.

Q. And what did he wear when he would get out of bed besides his coat?

(Testimony of Mrs. S. A. Tramontin.)

A. A night-gown and a coat. I took his sleeve out for three weeks and he put the coat on.

Q. He wore a night-gown and had his coat around him? A. Yes, sir.

Q. Did you see him after he left the hospital?

A. No,—I seen him once or twice after; I was busy.

Q. About the injury to his mouth—you say he made no complaint of that? A. No.

Q. Didn't he ever tell you about his jaw being stiff?

A. No, never told me anything—he don't talk much, of course.

Q. Did he ever say anything about being unable to open his mouth wide? [182] A. No.

Q. All his complaints were about his shoulders?

A. Yes; all his complaint was about his shoulders and his forehead here where he was cut, where he had the cut.

Q. Where he was hit over the eye?

A. Yes, a long cut in the side of the cheek there.

Q. Did he talk much to you about his case except when you asked him questions?

A. No, only when I ask questions; he don't talk much.

Q. He seldom talked to you unless you asked him questions? A. That is all.

Q. And you usually asked him about his shoulder?

A. Yes.

Q. And about his eye, where he had been cut and you had to take the stitches?

(Testimony of Mrs. S. A. Tramontin.)

A. Yes, he was all right anyway in about two weeks.

Q. That is what you talked about?

A. Yes, and his shoulder—I asked if it hurt him.

Q. Did you ever ask him about his mouth?

A. No.

Q. There was never any talk between you about that at all? A. No.

Q. Did you ever notice that in eating he didn't open his mouth wide at all?

A. He didn't eat much for twenty-four hours, but after that he is eating all the time.

Q. He lived mostly on soup for a week?

A. Soup and eggs and fruit.

Q. The first few days he lived almost entirely on soup, and afterwards began eating eggs?

A. Yes, and he ate meat, too. [183]

Q. You are sure he ate meat? A. Yes.

Q. How soon did he begin to eat meat?

A. About the third day.

Q. You were present when Doctor Duckwall examined him? A. Yes, sir.

Q. It was your business to give first-aid to the injured down there and your opinion on what was the matter with the patient was generally taken, was it not—you were a nurse and were supposed to know really more about injuries than anyone else in Ellamar? A. Yes.

Q. Whenever anybody was hurt it was put up to you to find out what the matter was and do something for them as soon as you could and as far as

(Testimony of Mrs. S. A. Tramontin.)

you could? A. Yes, sir.

Q. And you passed judgment on all the cases?

A. Yes, sir.

Q. When was anything said between you and Tony about his coming to Valdez or going to Cordova to see a doctor?

A. He never said anything to me.

Q. He never said anything about it?

A. He never said anything about it.

Q. You asked him once whether he wanted to see a doctor?

A. Yes, I asked him if he wanted to see a doctor.

Q. Where were you sending persons who were badly hurt at that time?

A. I always take them to Valdez to Doctor Dalton or to Fort Liscum.

Q. Did you start one to Cordova?

A. No, I start one, I start two, to Seattle, to the specialist.

Q. You never sent anyone to Cordova?

A. No, I never sent anyone to Cordova. [184]

Q. When did you send anybody to Doctor Dalton for the last time?

A. The last time was in the month of June.

Q. Did you ever send anyone to Doctor Duckwall, after Ike Westberg?

A. Only one—and for Mr. Gedney.

Q. You have had quite a long experience for a nurse and you have stated that you have seen a great many bone fractures? A. Yes, sir.

Q. Do you think you are pretty well qualified to

(Testimony of Mrs. S. A. Tramontin.)

tell whether a man has a broken bone or not by feeling it?

A. In some men you can, and some you cannot, especially when he is fat it is hard to tell.

Q. Even if they have a doctor, even Doctor Dalton couldn't find out with an X-ray—it is hard to tell?

A. A thin man you can feel the bones and tell right away, but a fat man it is hard to tell by feeling the bones.

Q. You never did make up your mind whether he had a broken bone or not?

A. No, I never thought—

Q. Were your instructions to use your own judgment about cases?

A. Yes, I always asked the doctor.

Q. I mean in cases of an injury, when it first came to you—you passed judgment on it, whether it was a serious injury or not?

A. Yes, sir.

Q. And didn't you usually, if you thought it was serious, recommend taking him to the doctor at once?

A. If the case is not familiar, of course, I take him to the doctor.

Q. It is only twenty-eight miles from Ellamar to Valdez?

A. Yes, sir.

Q. Didn't you think this was a serious enough case to send to Valdez or Fort Liscum at once?

A. If he says anything to me I send him—he don't say anything to me. [185]

Q. You have been a nurse for nearly twenty years?

A. Yes, sir.

Q. Is it not true that in most instances that when

(Testimony of Mrs. S. A. Tramontin.)

a man is hurt he don't know how badly he is hurt except that he suffers pain? A. Yes, sir.

Q. Don't you think it was up to you to use your judgment and not to ask him?

A. I asked him if he wanted to go to Valdez.

Q. Don't you think if there was any doubt whether he was seriously injured, it was your duty to send him to a doctor or recommend that he be sent?

A. Yes; anyone that is injured I send to a doctor.

Q. Did you suggest to Mr. Estey that Tony be brought to a doctor?

A. No, I never suggest anything to Mr. Estey.

Q. You didn't think it was a serious enough case?

A. No, I didn't think it was a serious enough case to take him to the doctor.

Q. When a man has had his shoulder so badly hurt that you keep a bandage on it for three weeks, don't you think that is a serious enough case to send to a regular physician?

A. Sometimes it is bruised and in two or three weeks it is better.

Q. Was the shoulder swollen?

A. It never did swell much.

Q. You kept him in bandages for three weeks, but there was never anything about the case that made you think a doctor ought to see him?

A. Dr. Duckwall told me the shoulder is all right.

Q. That was several weeks afterwards?

A. Yes, sir.

Q. Before that time you didn't think it was necessary to send him to a doctor? [186]

(Testimony of Mrs. S. A. Tramontin.)

A. I never think—

Q. Don't you think it is a good idea to play safe in these cases? A. Yes, sir.

(By Mr. DONOHOE.)

Q. What conversation took place between you and Tony at the time you took the stitches out of the wound over his eye—what did he say at that time in regard to your treatment of him?

Mr. RITCHIE.—We object to that because Mr. Possus is not a physician or surgeon; he might appreciate the kindness to him but not know whether it was competent treatment.

Objection overruled; plaintiff allowed an exception.

A. He says, "I am very pleased I get so well; I haven't even got a scar on my eye"; he says, "It can't be any better than that; I never got a scar at all with all the stitches."

Witness excused.

Mr. DONOHOE.—At this time the defendant desires to offer in evidence the testimony of Doctor Duckwall, as it has been stipulated it might go into the record in the case.

The COURT.—The stipulation may be read and received as evidence in the case.

Mr. Bonnifield reads as follows:

(Title of Court and Cause.)

Deposition of Bertram F. Duckwall, for Defendant.

It is hereby stipulated and agreed by and between the plaintiff and defendant, acting through their respective attorneys of record, that in order to prevent

(Deposition of Bertram F. Duckwall.)

a postponement of the trial of the above-entitled cause for the purpose of securing the testimony [187] of Bertram F. Duckwall, a witness for defendant, who now resides in Eagle Pass, Texas, that the hereinafter statement of Bertram F. Duckwall's testimony shall be admitted as his deposition, with the same force and effect as if the said Bertram F. Duckwall was present in court and after being first duly sworn in this case to tell the truth, the whole truth and nothing but the truth had testified orally in court, and that said statement may be read in evidence at the trial of this cause or at any subsequent trial and shall be received by the Court and Jury as the sworn testimony of the said Bertram F. Duckwall in this case.

The plaintiff, however, reserves the right to object to any portion of said testimony, on the ground that the same is irrelevant, immaterial or incompetent; said objections, if any, shall be made at the time said testimony is offered in evidence at the trial and should the Court sustain said objections to any portion of said testimony, the same shall thereupon be ruled out and not received or considered by the jury, but all of said testimony which is admitted by the Court shall be received and considered by the jury as the sworn testimony of the said Bertram F. Duckwall, a witness on behalf of defendant.

TESTIMONY OF BERTRAM F. DUCKWALL.

My name is Bertram F. Duckwall. I am a captain in the Medical Corps of the United States Army; at this time, to wit: January 3d, 1917, I am

(Deposition of Bertram F. Duckwall.)

stationed at Eagle Pass, Texas.

I took a complete course in medicine and surgery in the University of Michigan and graduated as an M. D. from that institution in 1911. I entered as a first lieutenant, medical reserve corps of the United States Army, on the 28th day of November, 1911. I graduated from the United States Army Medical School in the year 1913. On the 27th day of May, 1913, I [188] entered as first lieutenant the Medical Corps of the United States Army and since was raised to the rank of captain in said medical corps. I have had an extensive experience in surgery and in generally treating and caring for patients who have received personal injuries, and am, and was, during the entire year of 1916 capable and competent to properly examine, care for, treat or perform any necessary operation on a person suffering from a fractured clavicle or a dislocation of the clavicle or a fracture or dislocation of any of the shoulder bones.

During the year 1915 and during the months of January, February and March, 1916, I was stationed at the United States Army Post at Fort Lisicum, a few miles from the town of Valdez, in the Territory of Alaska; that on or about the 9th day of February, 1916, I arrived at Ellamar, Alaska, in response to a summons by the Ellamar Mining Company of Alaska, to treat an employee of said company who was suffering from a broken leg. While there, on the 10th day of February, 1916, at the request of said defendant company, I made a care-

(Deposition of Bertram F. Duckwall.)

ful and thorough physical examination of Tony Possus, the above-named plaintiff, for the purpose of ascertaining if his right clavicle was fractured or broken or his right shoulder in any manner injured.

In making said examination I caused said plaintiff to remove all his clothing from his body down to the waist line and carefully examined the surface of his body all over his right shoulder and right clavicle and compared his right shoulder and right clavicle with his left shoulder and left clavicle and carefully felt the entire surface in the region of his right clavicle and right shoulder. I then required the plaintiff to perform the necessary physical exercises— [189]

Mr. RITCHIE.—We object to the reception of that statement as to his requiring the plaintiff to perform the necessary physical exercises because that is a conclusion of the witness; he should describe what exercises he refers to. He says he performed the necessary exercises but he don't say what they were—one doctor might think one exercise was necessary and another that it was not.

Objection overruled; plaintiff allowed an exception to the ruling.

(Mr. Bonnifield continues reading, as follows:)
I then required the plaintiff to perform the necessary physical exercises, with his arms, which would demonstrate if his right clavicle was broken or fractured; or any bone of his right shoulder dislocated. From said examination I am positive that, at that

(Deposition of Bertram F. Duckwall.)

time, the said plaintiff did not have a fracture of his right clavicle and that his right clavicle was not broken and that plaintiff's right shoulder, at that time, as well as his right clavicle was entirely normal and that no bones thereof were dislocated; and that said plaintiff's right shoulder was, at that time, in its normal condition and there was no reason why plaintiff could not use his right arm and right shoulder to its full normal strength.

I thereupon notified the plaintiff that there was nothing wrong with his right shoulder or right clavicle and that he could go to work in the mine, as a miner, any time he wanted to; I also at the same time notified the officers of the defendant company, in charge of the defendant's mining operations, at Ellamar, Alaska, that the plaintiff's right clavicle and right shoulder were in their normal condition; that said clavicle was not broken or fractured and was not [190] dislocated and that there was no reason why the plaintiff could not then use his right arm and right shoulder to its full normal strength and there was no reason, in my opinion, why the plaintiff could not, at once, resume his work as a miner.

The physical exercises which I required the plaintiff to perform at the time of making said examination could not have been performed by him had his right clavicle been fractured or broken or even dislocated; Mrs. Tramontin, the nurse in charge of the company's temporary hospital, was present at the time of this examination and saw the exercises which

(Deposition of S. A. Tramontin.)

I required plaintiff to perform.

Dated at Valdez, Alaska, this 3d day of January, 1917.

LYONS & RITCHIE,

Attorneys for Pltff.

DONOHUE & DIMOND,

Attorneys for Deft.

Mr. RITCHIE.—I want to recall Mrs. Tramontin for one or two questions brought out by this deposition.

The COURT.—Very well.

Testimony of Mrs. S. A. Tramontin, for Defendant.

Mrs. TRAMONTIN, recalled.

(Questions by Mr. RITCHIE.)

Q. Do you know why Doctor Duckwall examined Tony to see whether his clavicle was broken?

A. I called Doctor Duckwall to examine Tony—I told Dr. Duckwall.

Q. Was there anything about the condition there at that time, the condition of the shoulder, to lead you to believe it was fractured, the bone was fractured?

A. I didn't see any pain at the time the doctor examined him.

(Answer stricken out as not responsive.)

Q. I want to know whether there was anything in Tony's condition or the complaints he was making at that time that made you think that his clavicle was really broken? [191]

A. Well, he never said anything—he never complained of anything.

(Testimony of Mrs. S. A. Tramontin.)

Q. Then why did you or somebody else ask Doctor Duckwall to examine him to see if it was broken?

A. Because he was complaining all the time, he said his arm is sore, his arm is still sore.

Q. And his shoulder?

A. And his shoulder is sore, right in here (indicating).

Q. He complained of pains and soreness in the region of the clavicle? A. Yes, sir.

Q. And that made you think there might be an injury there?

A. Yes, I thought there might be something.

Witness excused.

WHEREUPON, court adjourned until to-morrow (Saturday), at ten o'clock A. M.

Saturday, January 6, 1917—Morning Session.

Mr. DONOHUE.—We will call Doctor Gross.
[192]

Testimony of Elmer C. Gross, for Defendant.

ELMER C. GROSS, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. DONOHUE.)

Q. State your full name. A. Elmer C. Gross.

Q. Where do you reside? A. Ellamar, Alaska.

Q. What is your profession?

A. Practicing medicine and surgery.

Q. From what school did you graduate?

A. John Hopkins University Medical School, Baltimore.

(Testimony of Elmer C. Gross.)

Q. When did you graduate from that institution?

A. In June, 1911.

Q. Where did you first begin to practice?

A. In Seattle, Washington.

Q. With whom were you associated in the practice of medicine and surgery in Seattle, Washington?

A. During the second year of my stay there I was associated with Doctor Lowe and after that with Doctor Parke Reed Willis.

Q. Did Doctor Willis have a contract with the Seattle Electric Co? A. He did.

Q. For taking care of its injured employees?

A. Yes, sir.

Q. And did he have a contract with any other concern for taking care of its injured employees?

A. He had several other contracts, yes.

Q. What part of Doctor Lowe's practice was principally under your charge, if any?

A. Doctor Lowe was in private practice—he had no contract.

Q. Which doctor was it that had the contract?
[193] A. Doctor Willis.

Q. What portion of Doctor Willis's practice was under your supervision and control?

A. Most of the contract work?

Q. Of that contract work did you have the taking care of injured employees or persons of the Seattle Electric Company? A. I did.

Q. Did you have an extensive experience and practice in caring for injured persons?

(Testimony of Elmer C. Gross.)

Mr. RITCHIE.—We object to that.

Q. How extensive was your experience in taking care of injured persons?

A. There were a great many people injured in that work and I saw all the cases of injury that came under the Seattle Electric Company and the Northern Pacific Railway—that part we were taking care of.

Q. How many years did you put in in that practice? A. It was about two years.

Q. In the course of that practice did you from time to time have any occasion to treat and examine patients whose clavicle had been broken?

A. On several occasions I had such cases.

Q. From your experience in that practice of two years, have you had sufficient experience and from your general knowledge of surgery and medicine—have you had sufficient experience and knowledge to examine a patient to ascertain the condition of his clavicle and other bones in the region of his shoulder?

Mr. RITCHIE.—We object to that as calling for the doctor's opinion as to his qualifications.

Objection overruled; plaintiff allowed an exception. A. I think I have. [194]

Q. Did you, during your practice with Doctor Willis, have any experience in taking X-ray photographs of patients for the purpose of ascertaining the extent of their injuries? A. Yes, sir, I did.

Q. To what extent did you have that experience?

A. I did practically all of the X-ray work for Doctor Willis during that time.

(Testimony of Elmer C. Gross.)

Q. About how frequently during those two years would you be called upon to make X-ray examinations and take pictures of injured persons?

A. I think perhaps we would average about two or three X-ray pictures a day.

Q. And that practice continued for almost two years? A. Yes, sir.

Q. When did you first take up your residence at Ellamar? A. In February, 1916.

Q. And what position do you occupy with the Ellamar Mining Company at this time?

A. I am physician and surgeon for the company.

Q. And have been that since you arrived there in February, 1916? A. Yes, sir.

Q. Just describe the equipment of the hospital at the Ellamar mine at this time.

Mr. RITCHIE.—We object, on the ground that they did not have this equipment at the time this plaintiff was injured or at any time while he was under their care.

The COURT.—The evidence may be received by the jury for the limited purpose, as stated yesterday, relative to the testimony of Mr. Middlecamp on the same subject. The objection will be overruled and plaintiff allowed an exception.

A. We have a hospital there equipped to take care of any form of— [195]

The COURT.—I think your question is too broad, that is, up to the present time—I think it should be limited to the 22d of August, 1916, if that is the date.

(Testimony of Elmer C. Gross.)

Mr. DONOHUE.—Very well; those other questions may be stricken out.

Q. When did you first get your hospital there equipped for the reception of patients?

Mr. RITCHIE.—We object to that, same objection, and take an exception.

A. It was equipped for the reception of patients—I arrived there on the 19th and on the 22d we were in shape to take in patients.

Q. How do you fix it as the 22d?

A. I had occasion to admit a patient at that time and took care of him in the hospital.

Q. Did you perform an operation at that time?

A. I did.

Q. Now, when did you install the surgical apparatus completely in the hospital?

Mr. RITCHIE.—We make the same objection.

Objection overruled; plaintiff allowed an exception.

A. Well, it wasn't all installed at one time; the surgical equipment has been added to during the time I have been there.

Q. I will ask you if, by the first of April, 1916, you had it equipped with the X-ray apparatus and other necessary surgical appliances?

Same objection—objection overruled; plaintiff excepts.

A. I did.

Q. Was the equipment maintained there up to and including the 5th day of September, 1916?

Same objection: overruled: plaintiff excepts

(Testimony of Elmer C. Gross.)

A. It was. [196]

Q. And has it been maintained from that time on?

Mr. RITCHIE.—We make the same objection.

Mr. DONOHOE.—The purpose of that question is this: The examination that Doctor Gross did make of the patient was on the 5th day of September. I want to show that had the patient accepted the treatment offered him there, that the hospital was still maintained so he could have received it—if it ceased to exist on the 5th of September, there would be no advantage in accepting the proposition.

The COURT.—The objection will be overruled and the evidence may be received by the jury for the limited purpose I have indicated; plaintiff excepts.

A. It has.

Q. Now, describe the surgical equipment and appliances of the hospital from the time they were installed.

Same objection; objection overruled; plaintiff excepts.

A. Well, we have the surgical instruments that are required for any operation that it might be necessary to perform. We have a sterilizer for the preparation of dressings and liniment and tools, etc., used in such work, and we have an X-ray machine for the purpose of taking X-ray pictures and the hospital is equipped with bed; we have running water.

Q. Would you say that it was a well-equipped hospital for taking care of all injuries received in accidents to persons? A. I would say that it was.

Q. You say you were prepared to take patients

(Testimony of Elmer C. Gross.)

into the hospital, and did take patients in as early as the 22d day of February, 1916?

Same objection; objection overruled; plaintiff excepts.

A. Yes.

Q. When did you first meet this plaintiff, Tony Possus? A. On September 5, 1916. [197]

Q. Did he come to the hospital at that time?

A. He did.

Q. Did you make an examination of him?

A. I did.

Q. Just describe to the jury what you did in making that examination.

A. I had the patient remove the clothing from the upper part of his body, as he complained of trouble in the shoulder, and asked him to go through various manoeuvres which would indicate to me if there was trouble about the shoulder and what the extent of that trouble was.

Q. Will you just illustrate to the jury what manoeuvres you required the plaintiff to go through? And if he did go through any? First, did he comply with your request to go through these exercises?

A. He did.

Q. Illustrate to the jury what manoeuvres or exercises he performed for you so you might ascertain if there were any injuries in his right shoulder?

A. He was asked to place his right hand on the left shoulder, which he did without complaining of pain.

Q. That was, with his arm across his breast, was it?

(Testimony of Elmer C. Gross.)

A. Yes, sir. And then he was asked to put the other hand acrossed and the measurements taken to see whether there was any difference in the distances to which he could put the one or the other over; and he was asked to throw the arms back in this position (indicating).

Q. What position would you call that—to throw the arms back did you say?

A. We would call that extension backward. [198]

Q. Extending his arms backward?

A. Yes, sir. To determine if there was any difference in the extent to which one arm or the other raising the arm up in this position (indicating). and I could note no difference in the amount of extension back. He was asked to raise the right arm in this position (indicating)—

Q. How far was he to raise it, horizontally with the shoulder or how?

A. He was to raise it as far as he could; first, to raise it in a horizontal position and then to raise it as far as he could. He complained of some pain in raising the arm up in this position (indicating).

Q. That was, up to a perpendicular position?

A. Yes, sir. He was, howeevr, able to raise the arms up in this position (indicating) and one as far as the other, although he complained of some soreness over the point of the shoulder, as he raised his arm.

Q. He was able to raise both his arms in a perpendicular position up over his shoulder?

A. Yes. He was asked to place his right hand be-

(Testimony of Elmer C. Gross.)

hind his head which he did, although he complained of some slight soreness over the point of the shoulder. He was asked to place his hands out in this position (indicating).

Q. That was, both arms extended directly in front of him, was it?

A. Yes, sir. I was standing directly in front of him, keeping the medical line direct and bringing the hands out, so the line between the hands would be perpendicular to the body, and this was to determine whether there was any difference in the length of the two arms held out directly this way (indicating), which might be due to the abnormal position of the shoulder. I [199] could detect no difference in the two arms in that manoeuvre.

Q. The object of these various movements that you have given was to determine whether there was any deformity or disability in the shoulder, which would prevent him from using the right arm as he did the left?

A. Well, he complained of soreness in elevating the arm. There was nothing evident that kept him from putting his right arm in any position he could the left—there was no obstacle to prevent the motion; the only thing was the pain that he complained of in raising the arm.

Q. Doctor, are the exercises or manoeuvres which you have just described the tests prescribed by standard authors on surgery to determine if there are any defects in the shoulder or clavicle?

A. I think they are; I don't know that there are

(Testimony of Elmer C. Gross.)

any series of tests that are compiled together to show these things, but they are the motions that are ordinarily used to determine trouble about the shoulder joint or arm.

Q. Or clavicle? A. Yes.

Q. Have you in your past experience as a physician and surgeon used these manoeuvres and exercises for the purpose of determining whether there was any defect in the shoulder or clavicle of a patient? A. I have.

Q. Now, what further examination did you make of the plaintiff at this time?

A. I examined the region of the shoulder carefully. During these manoeuvres I kept my hand over the joint and movable parts of the shoulder at that time to detect whether there was any, what we call grating, a thing which cannot only be heard [200] but felt. If there is any trouble in the joint, like the motion of a broken bone together, it gives a grating sensation which can both be felt and heard. I manipulated the various movable parts of the arm and carefully felt over the bones that were accessible.

Q. Did you during these exercises discover any grating of any bones, either of the right clavicle or the region of the right shoulder?

A. None whatever.

Q. Could you from that examination definitely determine if there was a fracture of the right clavicle with separation at that time? A. I could have.

Q. Was there such a condition?

A. I found none.

(Testimony of Elmer C. Gross.)

Q. What would you say was the condition of the right clavicle as to being fractured with separation at that time or otherwise?

A. I would say it was not fractured and was not separated?

Q. Did you take an X-ray photograph of the plaintiff at that time, of his right shoulder? A. I did.

Q. And also of his left shoulder? A. Yes, sir.

Q. Have you those photographs?

A. I have. (Witness produces them.)

Q. Will you examine these photographs and explain to the jury the condition you found the clavicle in? Just identify that first; what have you at this time in your hand?

A. This is an X-ray photograph of the left shoulder.

Q. Of the left shoulder of the plaintiff. [201]

A. Yes, sir.

Q. Taken when? A. Taken September 5, 1916.

Q. By yourself? A. By myself.

Mr. DONOHOE.—We offer this in evidence and ask it be marked as Defendant's Exhibit No. 3.

It is so marked and admitted in evidence without objection and made a part of this record.

Q. What have you in your hand at this time?

A. This is an X-ray photograph of the right shoulder, taken September 5, 1916, by me.

Q. Of the plaintiff? A. Yes.

Mr. DONOHOE.—We offer it in evidence.

It is admitted in evidence, without objection,

It is admitted in evidence, without objection,

(Testimony of Elmer C. Gross.)

marked Defendant's Exhibit No. 4 and made a part hereof.

Q. What have you now in your hand?

A. This is another X-ray photograph of the right shoulder of Tony Possus taken September 5, 1916.

It is offered in evidence and admitted without objection, marked Defendant's Exhibit No. 5, and made a part hereof.

Q. I now hand you Defendant's Exhibits Number 3, 4 and 5 and ask you to explain to the jury the condition of the plaintiff's right shoulder and right clavicle and a comparison of his right shoulder with his left shoulder and left clavicle as it appeared on the 5th day of September, 1916, under this X-ray examination.

A. I will hold these two pictures up together, the pictures of the right and left shoulders, so you may compare the two and I will explain the different positions shown here. This is the clavicle, [202] this being the end which joins with the breast bone or sternum, and this being the end which joins with the point of the scapula or shoulder blade. This is the head of the long arm of the bone which fits into the socket here. This joint is what we call a non-movable joint, that is, in the movements of the arm there is a very slight, if any, motion in that joint—it is simply a connection between these two bones. This bone, the collar-bone or clavicle, is the bone which keeps the shoulder back in this position (indicating); as the picture shows here, this is absolutely normal as far as we can see, that is, the left shoulder.

(Testimony of Elmer C. Gross.)

And this is a picture of the right shoulder here, being the clavicle or collar-bone, this being the point of the shoulder blade or scapula, this being the head of the long bone of the arm. This picture does not show the inner side, as the trouble complained of is out in this region and the X-ray tube was focused on this part of the arm.

You will notice here a sharp tip on this bone which does not show in the picture of the normal bone. You will notice that this is practically straight across the surface while on this side is this sharp tipping up. That indicates that there has been a slight injury to the bone at this point; that certain ligaments which hold this bone in place and make the joint with this bone attachment across this spot, evidently the attachment of one of these ligaments has been jerked loose and raised that, but it has healed solid again, there being a perfect union there and allowed no separation of the joint, as you can see by comparing the two—the space between the two bones is identical as far as can be determined.

If there was a dislocation at this point, this bone invariably tips up, leaving a wide space here and leaving a prominence [203] on the point of the shoulder at this point. Here also in this bone, this new bone, at this point, does not show as distinctly as the old bone. You will notice beginning about here, there is a raise in the surface of the bone also here. That is rather hazy; that bone there is new bone. You will notice the structure of the old bone

(Testimony of Elmer C. Gross.)

is very definite and easy to make out, but the new bone, being not as thick, shows more hazy—there has been some enlargement of the bone for some reason at this point.

JUROR.—That is the right shoulder?

A. The right shoulder—whether there has been a fracture across the clavicle or collar-bone at that point or whether there has been a bruising of the bone, which has caused new bone to be thrown out, it is impossible to say from the picture. There is no deformity of the bone which would indicate any break in the continuity of the bone. A bruise over the bone at this point causing what we call an inflammation of the membrane that covers the bone will often cause new bone to be thrown out, giving a deformity which shows as it does in this picture; or a fracture across the bone at this point would also cause new bone to be thrown out, which would give the same appearance and from the picture, it cannot be told which condition is present.

But the alignment as shown in this picture—what we mean by the alignment is the position of the bone as a whole—has not been disturbed. If there had been a fracture, that displacement of the fragments was forward, that is, in a horizontal plane to this plate, and that would have shown very definitely. You will see by my two fingers in this position (indicating). If there had been a fracture and displacement of fragments and such displacement had been in this position, beyond, the plate being behind, of course one fragment would be taken through

(Testimony of Elmer C. Gross.)

[204] the other, but the density of the bone would be so much greater through those two portions, that that would show very definitely and show a line of demarkation at the end of the bone on this side and the end of the bone on this side. Of course new bone would be thrown out if a union had taken place, new bone would be thrown out at the end, but there is a definite difference in the appearance of new bone as taken by the X-ray picture and the appearance of the old bone. It is very like the joint of a pipe, the end of the old pipe would show very definitely. Therefore, I think I can say very positively that there has been no appreciable overlapping. Of course if the break had been diagonal, there might be a slight shoving up, which would leave this thin bone to overlap a very small amount and you might not be able to detect it right at the point, but if there was any appreciable overlapping, that would show very definitely in the density of the bone at that point. I think that is as much as I can show with the X-ray. There is quite a definite enlargement at this point, as can be made out, not only by the X-ray picture, but can be felt.

Q. From your experience in taking X-ray pictures of human bones, state if you are able to definitely ascertain from the picture where new bone and old bone appear in the picture.

A. Yes, I think so.

Q. Are you from this X-ray photograph you have taken able to definitely ascertain if there is any considerable overlapping at the union of the right clav-

(Testimony of Elmer C. Gross.)

icle of the plaintiff? A. I am.

Q. What is your opinion as to whether there is any overlapping at the union of the right clavicle or otherwise?

A. My opinion is that there is no overlapping.
[205]

Q. Now, how do you account for the slight increase in the thickness of the right clavicle over the normal thickness at the point where this enlargement appears?

A. There is new bone been thrown out as shows by the picture at this point. Whether that is due to a fracture or as I explained, to this injury to the bone, there is new bone been thrown out, making the collar-bone larger at that point, making a definite enlargement that you can feel.

Q. That enlargement you say might have been occasioned by a bruise of the bone, without there actually being a fracture? A. It might.

Q. Now, assuming, that there was a fracture at this particular point of the right clavicle of the plaintiff and it had been as perfectly joined together, or the union of the bones had been as perfect, as human skill is ordinarily able to accomplish, would it leave an enlargement at that place?

A. It would.

Q. Explain how that enlargement occurs—what is the cause of it?

A. The cause of the enlargement is throwing out of new bone. Whenever a bone is fractured and

(Testimony of Elmer C. Gross.)

the ends of that bone are brought together, within a very short period new bone begins to form, not only the space at the end of the bone, but it is thrown out around the break, because there is always more or less injury around the ends of the bone besides the injury directly on the ends, and there is always a rim of new bone thrown out around the break—very much like the soldering of a pipe.

Q. This new bone being thrown out is nature's way to protect the union of a broken bone?

A. Yes, sir.

Q. It is through this new bone being thrown out that the union is created? [206] A. Yes, sir.

Q. Now, after your physical examination of the plaintiff and your X-ray examination of the plaintiff on September 5, 1916, what is your opinion of the condition of this plaintiff as to whether the plaintiff is permanently injured in his right shoulder or right clavicle at this time, or at the time you made the examination?

A. My opinion is that he was not.

Q. Is there anything that would cause him any disability in the use of his right arm or right shoulder by reason of the enlargement which you discovered upon his right clavicle?

A. I can see no reason whatever for a disability.

Q. Is it possible for any disability to arise from that union or enlargement of the right clavicle which you have explained to the jury?

A. It is a pretty hard thing to say what is possible, but I can see no reason whatever for a dis-

(Testimony of Elmer C. Gross.)

ability arising from such a condition as the collar-bone shows.

Q. Did you find from your examination any defect of his right shoulder or right clavicle that in your opinion in any manner limits the motion of his right arm, from your examination at that time?

A. I did not.

Q. After this examination was completed, describe to the jury how the plaintiff used his arms in replacing his clothing on the upper part of his body.

A. The patient was allowed to dress himself unassisted after the examination and in putting on his undershirt, he was able to throw the arms up in this position (indicating) with no apparent evidence of any trouble or pain. [207]

Q. He threw his arms in a perpendicular position up over his head in order to pull his undershirt on?

A. He did.

Q. Did he complain at that time that he was suffering any pain by raising his right arm to that extent? A. He made no complaint whatever.

Q. Did he appear to flinch or indicate in any manner that he was suffering any pain by raising his right arm over his head in that way?

A. No, he did not.

Q. Now, after this examination was completed, did you recommend any treatment for the plaintiff in case he was really suffering pain in his right shoulder?

Mr. RITCHIE.—We object to that as irrelevant.

(Testimony of Elmer C. Gross.)

Objection overruled; plaintiff allowed an exception.

A. He complained of soreness, as I say, over the shoulder and—

Q. Just a moment. Where did he locate that soreness?

A. He located the soreness at this point (indicating).

Q. Did he locate any soreness at the point where the clavicle appeared to have a union or fracture?

A. None whatever; no soreness or tenderness or pain.

Q. How far in inches from the clavicle or from the outer end of the clavicle did he indicate where the pain was?

A. The joint of the clavicle is about in this position (indicating), and the indicated point was on the tip of the shoulder; I should say it was an inch and a half from the end of the clavicle.

Q. Are there any ligaments or muscles or nerves leading from the clavicle that would cause pain at the point of his shoulder, owing to any dislocation of the clavicle? A. I think not. [208]

Q. What is your opinion or what was your opinion on the 5th day of September, 1916, when you made this examination, as to whether or not the plaintiff at that time had the full normal strength of his right arm and shoulder?

A. My opinion at that time was that he had.

Q. Did you make any statement or express your

(Testimony of Elmer C. Gross.)

opinion to the plaintiff after you made this examination as to his condition?

A. I told him frankly that I could find no cause for any trouble there; he insisted that there was pain there.

Q. Pain on the top on his right shoulder?

A. Yes; and I told him if there was pain there that it seemed to be in the muscle, from what he indicated to me, and that that could be relieved by massage and application of liniments.

Q. Did you propose to him at that time to give him such treatment? A. I did.

Q. And what was his attitude regarding it?

A. He refused to accept any treatment.

Q. You were fully equipped at the hospital at that time to take proper care of him and give him that treatment, were you?

Mr. RITCHIE.—We object to that as irrelevant and immaterial.

Objection overruled; plaintiff allowed an exception.

A. I was.

Q. And he refused? A. Yes, sir, he did.

Q. Did you make a subsequent examination of the plaintiff? A. I did.

Q. When did you make that examination and who were present at the time?

A. I was present at an examination made with Doctor Boyle, Doctor Winans and Doctor Newlove from the Post—I believe that examination was day before yesterday. [209]

(Testimony of Elmer C. Gross.)

Q. In Doctor Boyle's office?

A. In Doctor Boyle's office.

Q. Explain to the jury how that examination proceeded and what was done.

A. I don't know that all the men present made the same examination.

Q. Who conducted the examination? Was the examination conducted by one doctor and the others watching?

A. Part of it was and we each made whatever examination we chose to make. The patient was made to go through practically the same exercises which I have described.

Q. He was first stripped to the waist?

A. He was first stripped to the waist; yes.

Q. And went through the same exercises that you described you put him through on your examination at Ellamar on the 5th day of September, 1916?

A. He did.

Q. Did he experience any difficulty in going through those exercises?

A. He complained of pain.

Q. When?

A. On raising the arm and putting the arm in this position (indicating) and putting the arm up on the shoulder here.

Q. In your examination at Ellamar, he didn't complain of putting his right hand on his left shoulder, with his arm across his breast, did he?

Mr. RITCHIE.—We object to the question as leading.

(Testimony of Elmer C. Gross.)

Objection sustained. Defendant excepts.

Q. Doctor Gross, state to the jury whether or not in the examination at Ellamar on the 5th day of September, 1916, the plaintiff complained of any pain at the time you required him to put his [210] right hand upon his left shoulder, with his arm *acrossed* his breast?

A. He made no complaint of pain in performing that motion.

Q. What were the only motions at which he made a complaint as to causing him pain?

A. The motions which required him to raise his arm in this position (indicating).

Q. Describe what you mean by that position.

A. When I asked him to elevate the right arm in this position, he complained of pain at this point, in the muscle.

Q. On the examination held in Doctor Boyle's office the day before yesterday, or last Wednesday, what motions did he complain of causing him pain?

A. He complained of practically all the motions during the first part of the examination—he complained of practically all the motions that he was asked to make with the arm.

Q. Did you take his right arm and move it in any position? A. I did.

Q. Did you feel any resistance when you attempted to move his right hand to the point of his left shoulder?

A. There was resistance in the arm to the motion.

(Testimony of Elmer C. Gross.)

Q. What portion of the arm did this resistance appear to be in?

A. The resistance apparently came from the elbow joint. In putting the arm up this way, the resistance was apparently in the part of the arm here (indicating).

Q. Is it possible to ascertain from the involuntary contraction of the muscles in the region of a point where pain occurs, if there is pain there?

A. If there is any extensive pain, there is practically always a contracted state of the muscles, what we call rigidity, which can be definitely felt; that is an action on the part of [211] muscles to protect the part which is being irritated.

Q. At the time you moved the plaintiff's right hand to his left shoulder, did you have your other hand in the region of his clavicle, so as to ascertain if the pain really originated there? A. I did.

Q. And what were the results you found there?

A. I found no rigidity in the muscles in the region of the complained trouble.

Q. Was there an X-ray photograph taken at the time you made this examination last Wednesday?

A. There was.

Q. Have you examined that X-ray? A. I did.

Q. Is there anything from that X-ray that you could further explain to the jury the condition of his right clavicle other than you have explained by Defendant's Exhibits 3, 4 and 5?

A. The picture was not a good one and didn't show very much—it shows the bones and that is about all.

(Testimony of Elmer C. Gross.)

Q. What is your opinion—in case there was at one time a fracture of the plaintiff's right clavicle, which caused separation—what is your opinion as to whether the union of that bone is good or bad?

A. My opinion is that the union is good.

Q. What would you say, from your experience in treating cases of a fractured clavicle, whether or not the union as you found it from your various examinations, was as good as is ordinarily obtained in such cases? A. I would say it is as good.

Q. In your opinion, assuming that there was a fracture of the right clavicle last January, could there be, by any ordinary surgical [212] care, a better union of that bone obtained than you find there in its present condition?

A. I don't see that anything whatever could be accomplished by changing the bone—the alignment is perfect as far as I can tell, that is, the alignment of the bone itself.

Q. Then in your opinion that is as good a union as is ordinarily obtained in cases of fractured clavicle? A. Yes, sir.

Q. What difference did you discover as to the length, the relative lengths of the right and left clavicle of the plaintiff in this examination?

A. The right clavicle was a quarter of an inch according to my measurement shorter than the left.

Q. Would that of itself cause any disability?

A. No, I think not.

Q. What would be the result as to the position of the right shoulder if the shortening of the right clav-

(Testimony of Elmer C. Gross.)

icle is caused by this union of the bone—would it in any manner partially disable the shoulder or arm?

A. There might be sufficient shortening that there would be a dropping forward of the shoulder, resulting in a more or less extensive deformity—it might cause disability or might not.

Q. In your examination of the right and left shoulder, state whether or not the position of the right shoulder is normal or otherwise?

A. I could detect no difference in the two shoulders except for the enlargement.

Q. The only difference then that you detected was a slight enlargement of the right clavicle?

A. Yes, sir.

Q. At that particular point of the clavicle is there a natural [213] prominence of the bone, at that point?

A. There is.

Q. To what extent?

A. The bone makes a large curve as it extends back toward the shoulder and then there is a sort of depression and a slight enlargement and then a backward extension towards the joint.

Q. Can you state to what extent this enlargement of the right clavicle is different from the normal clavicle at that point?

A. That is pretty hard to say because the size of the clavicles varies. Sometimes the right is larger than the left and sometimes the left is larger than the right, and it is impossible to say just how much of the enlargement on the one or the other side is due to an abnormality and how much was natural

(Testimony of Elmer C. Gross.)

there, but there is quite an enlargement there, I should say perhaps nearly half an inch of new bone, that is, an enlargement due to that new bone.

Q. That is the ordinary enlargement, is it, where a bone unites?

A. The amount of enlargement, the amount of new bone thrown out, varies greatly—it is not the same in any two cases.

Q. Would you say that the plaintiff's clavicle at this time, plaintiff's right clavicle, is in any manner deformed to any extent that would impair his ability to use his right arm or shoulder?

A. I would say in my opinion it was not.

Q. There has been more or less testimony introduced relative to the advisability of having an operation performed on the plaintiff's right clavicle. What is your opinion, as an experienced physician and surgeon, as to whether or not such a thing would be in any manner necessary or desirable to have done?

A. I can see no reason whatever to indicate an operation.

Q. Can you see any reason or any manner of performing an operation [214] that would make the union of the right clavicle at this particular point better than it now is? A. No, I cannot.

Q. Now, in making these two examinations, one on the 5th day of September, 1916, and one on last Wednesday, did you discover any tenderness in the region of the plaintiff's right clavicle?

(Testimony of Elmer C. Gross.)

A. I found no tenderness whatever—there was none complained of.

Q. If there was any defect in this clavicle would it or would it not cause pain in the region of the clavicle?

A. A defect might cause pain or it might not.

Q. If there was anything connected with the union of the right clavicle that would disable the plaintiff's right arm or shoulder, would there be pain in the region of the clavicle?

A. I would certainly expect to find pain at the seat of the cause of the trouble.

Q. And would you find tenderness there under those conditions too?

A. You would very likely find tenderness there.

Q. Did you discover any tenderness at that point in either of your examinations?

A. None whatever.

Q. Did the patient at either of the examinations complain of any pain or tenderness at the point, about the right clavicle? A. No, he did not.

Q. Are there other causes, other than the result of this injury, which might cause the plaintiff some difficulty in extending his right arm in a perpendicular position?

A. A rheumatic condition in the muscles about the shoulder joint very often causes pain in the movements to elevate the arm.

Q. Have you examined the X-ray photograph taken by Doctor Chase of Cordova, which is Plaintiff's Exhibit "B"—did you examine that [215]

(Testimony of Elmer C. Gross.)

photograph? A. I have.

Q. Does that photograph show any dislocation of the right clavicle? A. None whatever.

Q. Will you take that photograph and explain to the jury why the photograph does not show any dislocation of the right clavicle?

A. I pointed this out on the other pictures—the comparison with the other shoulder. This is the joint of the clavicle or collar bone with the point of the shoulder blade or scapula. This space as you see between here and the junction of the joint in the actual shoulder is not a space although it shows to be in the picture; the ends of the bone which make up the joint are covered by cartilage—the cartilage is the smooth shiny substance on the end of the bone which makes a smooth surface in the joint. That in the X-ray picture is transparent, it does not show at all in the photograph—that accounts for the space between these two points. In actual fact there is no space between there, the two ends knit together, but that is taken up by the cartilage and if there was a dislocation, as I said before, that end of the bone would be elevated with a characteristic deformity there, a characteristic prominence or deformity.

Q. Is there any explanation you care to make of the X-ray picture taken by Doctor Boyle and introduced in evidence? Taken by Doctor Boyle last Wednesday at the time of this examination you have testified to?

A. I think not—both of these pictures show a little more clearly than the other and the condition is prac-

(Testimony of Elmer C. Gross.)

tically the same—I don't see any change in it.

Q. What would be the nature of a fractured clavicle that would [216] warrant an operation?

A. An ununited fracture, with callous over the ends of the bone, would justify an operation to remove the callous from the end of the bone and freshen it, so when it was brought into proper position it would unite. With callous over the end of a fractured bone, even though they are brought into good position, there would be no union; if the bone has been out of position and allowed to callous over the ends, it is impossible to get a union until those ends are freshened up and brought into that position (indicating). If there is a shattering of the collar-bone, broken into pieces, so it is impossible to keep the bones in apposition owing to the position of the pieces, it is sometimes necessary to wire or splint those pieces to keep them in apposition to get a healing.

Q. But in an ordinary clean break an operation is never performed?

A. No, not until healing fails to take place.

Q. I believe you have already testified to the fact that the union in this bone, if there was a union, was as good as ordinarily is obtained in the case of a fractured clavicle?

A. Yes, sir.

Q. You were present in the courtroom yesterday, were you not, when Doctor Boyle testified and made certain explanations of the plaintiff's shoulders?

A. I was.

Q. Will you at this time make a demonstration of

(Testimony of Elmer C. Gross.)

the plaintiff's shoulders to the jury for the purpose of explaining your theory of the position of his clavicle? A. I will.

Mr. DONOHOE.—We ask that the plaintiff come forward and take off his shirt. [217]

The COURT.—Very well.

(Plaintiff does so.)

The WITNESS.—As pointed out to you yesterday, here is the deformity spoken of, right at this point. In passing your finger along the collar-bone here, you come to a prominence which is about the junction of the middle and outer third of the clavicle. We make these divisions in order to localize the point, and this enlargement extends back to this point (indicating). If you notice there, there is a similar depression on the other side, not so extensive as on this, owing to the enlargement of the bone, but the natural clavicle takes a dip back at this point and then just beyond that is a point of prominence. This enlargement here comes right at the position of the natural prominence, but it is much more prominent as can be seen as well as felt, on this side. That is due to the outgrowth of new bone as shown by the X-ray picture. In taking the two clavicles between my fingers at the same position, you will notice that there is probably a slight difference on the two sides, this being a little wider. That is very natural with the outgrowth of new bone there. That cannot be due to overlapping as was pointed out, because the X-ray pictures taken in this position, the plate being behind, being a horizontal plane of this, if this

(Testimony of Elmer C. Gross.)

greater width here was due to overlapping, it would be this position which would definitely show in the X-ray picture to any eye. In my opinion the overlapping in the other position shows just as clearly but it is a matter of interpretation of the density rather than to see the actual offset of the bones. As a matter of fact there is not a very much greater width there but it is perceptible in the two sides. When you feel behind [218] the collar-bone, you can feel the line of the collar-bone very definitely—there is very little difference that I can make out in the two. It is a very slight enlargement at this point which is natural, as the bone is thrown out all along the collar-bone, but the general alignment, even to the feel, is the same on the two sides. You can see the same depression on the two sides, except this, owing to the enlargement of the bone here, is greater on that side.

Mr. RITCHIE.—May I ask the witness a few questions at this time?

The COURT.—Yes.

(By Mr. RITCHIE.)

Q. Doctor, I will ask you if in passing your finger right along here on the summit or apex or upper line of the collar-bone, on the left side, if it is not practically even or smooth all the way while on this side, whether there is at one point a depression in the upper part of it?

A. Yes, as I stated before, there is an enlargement.

Q. Isn't this almost straight across there except this is gradually raising at the outer end while here

(Testimony of Elmer C. Gross.)

on the right shoulder there is a sudden depression which can be felt, isn't that true?

A. That is very true. It is due to the elevation of the bone here—you go up and naturally have to come down again when you get over the depression.

Q. You see where my two fingers are—is that near the outer third?

A. Not in the same position.

Q. Isn't there a marked depression here where my right finger is, on the right shoulder? A. Yes.

Q. And scarcely a perceptible depression where the left is? A. Yes, that is true. [219]

Q. Is that natural, or was it caused by whatever injury was received?

A. That is due to the elevation of the bone at this point.

Q. Is that one of the results of the injury?

A. Yes, it is the result of the outgrowth of bone at this point.

Q. There is a little depression here in the collar-bone—

A. There isn't a depression in the collar-bone itself but a depression behind the enlargement. If the enlargement wasn't there, you wouldn't notice the depression.

Q. This is not so much a depression as the elevation of new bone? A. Yes, sir.

Q. That is what causes the apparent depression?

A. Yes, sir.

Q. But the bone is not natural—it is not a natural original formation?

(Testimony of Elmer C. Gross.)

A. This enlargement is not.

Mr. RITCHIE.—That is all at this time.

(Examination by Mr. DONOHOE—Continued.)

JUROR.—Will you have the gentleman go through those exercises, the same as the doctor showed us he went through in his examination?

(No objection by counsel.)

By Doctor GROSS.—Put the left hand on the right shoulder.

(Plaintiff does so.)

Now put this hand on the other shoulder, put it clear up on top as far as you can.

(Plaintiff does so.)

Now put the other one up again. (Does so.) Now put this one up as far back as you can. (Does so.) Now put the other one up as [220] far as you can, up on top of your shoulder. (Does so.) Now let me take it and put it up; let your muscles go perfectly loose. Where does it hurt you?

The PLAINTIFF.—Here (indicating).

Doctor GROSS.—Now put your hands out in this position right straight in front of you towards me. (Does so.) Now let me take them—where does that hurt you?

Mr. RITCHIE.—I will ask you gentlemen of the jury to note the position of the back when the doctor draws the arms out.

Doctor GROSS.—Stand up straight. Now put your hands back in this position, turning your hands out like this the way I do here. (Does so.) Now let me take them—let your muscles go perfectly loose.

(Testimony of Elmer C. Gross.)

This arm is all right, isn't it? Stand straight and bring your arm right back—where does that hurt you?

PLAINTIFF.—Right here (indicating).

Doctor GROSS.—If it hurts you a little, just stand it for a little bit; let your arm go loose. There is no trouble in this place, is there? Let this joint go loose, like you did the other day. You notice the resistance in this joint. Rest your arm up like this—Where does that hurt you?

PLAINTIFF.—Here (indicating).

Doctor GROSS.—Raise your arms up in this position, up as high as you can. (Does so.) Put the other one right up. (Does so.) Let your arms go perfectly loose, let your elbow joint go loose at least. Where does it hurt you?

PLAINTIFF.—Right here (indicating).

Mr. RITCHIE.—Now put both your arms up suddenly like this?

Doctor GROSS.—It doesn't hurt you to go up that far?

PLAINTIFF.—Not now.

The COURT.—Will you ask him to leave his left shoulder in its [221] normal position and see if he can raise his right shoulder without raising the arm?

JUROR.—Throw your arm up that way (indicating). (Does so.)

Doctor GROSS.—Raise the right shoulder up this way (indicating).

(Plaintiff does so.)

(Testimony of Elmer C. Gross.)

Mr. RITCHIE.—Will you have him turn with his back to the jury and go through the same motion, raising the right shoulder?

(Plaintiff does so.)

(Plaintiff excused.)

(By Mr. DONOHOE.)

Q. Doctor Gross, you heard the testimony of Doctor Boyle in which he spoke of observing the plaintiff in his attitude and carriage on the streets of Valdez, at various times? A. Yes.

Q. Have you the past few days, since you came up from Ellamar, had occasion to also observe the plaintiff while upon the streets of Valdez and the manner in which he carried his right arm? A. I have.

Q. State what you noticed in that regard.

A. I noticed the plaintiff, the morning after the fire, in walking out from the sidewalk to the centre of the street, over debris, as he stepped over, in climbing over this debris, he threw the right arm up quite freely, about I should say in this position (indicating). In stepping up in this way he threw the arm up in this position.

Q. Did he seem to have any difficulty at that time?

A. He didn't seem to have any trouble.

Mr. DONOHOE.—That is all. [222]

Cross-examination.

(By Mr. RITCHIE.)

Q. Is it your opinion or otherwise that there has been some injury to that bone within the last year or two?

A. I couldn't say how long ago; it is my opinion

(Testimony of Elmer C. Gross.)

there has been an injury to the bone,—I couldn't say when the injury was.

Q. There is nothing about the present condition of it which would make you feel warranted in stating that it was within a definite time?

A. No, there is nothing.

Q. It might have been one year or five years?

A. Yes, sir.

Q. But in your opinion there has been an injury of some kind? A. Yes, sir.

Q. How would you describe that injury—in your opinion, was it a fracture or simply a bruise?

A. I can't say positively whether the outgrowth of new bone is due to a fracture or whether as I said before it was due to a bruise causing inflammation of the membrane that covers the bone, causing an outgrowth of new bone.

Q. A severe bruise to the periosteum sometimes causes the outgrowth of new bone, does it?

A. Yes, it does.

Q. Does that often occur in the absence of a fracture?

A. Quite often, with a bruise of the bone and resulting inflammation of the periosteum.

Q. A slight fracture sometimes grows together almost of itself, just by good luck, with a little attention? A. Yes, sir.

Q. It is true, is it not, and within the knowledge, the very extensive knowledge of the medical profession, where men have had [223] severe fractures of bone, out in remote camps, mining camps or

(Testimony of Elmer C. Gross.)

cattle camps, where there was no doctor within a hundred miles, and in a crude way they have set the bone the best they could and in a healthy man it would grow together again?

A. It happens sometimes.

Q. It will grow together sometimes in such a way as to cause a permanent disability, a limp in the leg?

A. Yes, sir.

Q. And yet the bone would be, even though there was some deformity, in a perfectly healthy condition? A. Yes, that is possible.

Q. So there would be no future difficulty except the deformity and any consequent stiffness that might be caused? A. That is very often true; yes.

Q. Now, in this case, you have told Mr. Donohoe that you think the union of whatever fracture there was, if there was one, has been perfect except for the growth of new bone—am I stating it correctly?

A. I didn't say the union was perfect—I said the alignment of the bone. Of course there is the deformity, which is not a perfection, but the alignment is perfect.

Q. Do you consider that bone as strong now as it ever was, that collar-bone? A. Yes.

Q. And just as useful? A. Yes, sir.

Q. Do you think that the thickening of the bone by the outgrowth of new bone has in any way caused a permanent stiffening?

A. I see no reason why it should cause any.

Q. A permanent stiffening of the shoulder, I mean?

(Testimony of Elmer C. Gross.)

A. No, I see no reason why it should cause that.
[224]

Q. Do you think the shoulder is as flexible as it was before? A. I think it is.

Q. I mean at this time—that he could, if he would, use it just as easily as he could before this injury?

A. I do.

Q. Then you think that his apparent reluctance to raise his arms and to use his shoulder as he does, his left shoulder, is entirely malingering?

A. It is my opinion that that is voluntary.

Q. Entirely voluntary?

A. Entirely voluntary.

Q. You spoke a while ago about the flinching or stiffening of the muscles when pain is caused always being in the immediate locality, as I understand it?

A. I didn't say it was always in that locality—I say there is always a rigidity of the muscles at the source of irritation.

Q. Isn't there also a rigidity in all the connecting members and all the muscles, especially where the nerve centres are running straight through?

A. There is a voluntary rigidity of other muscles to protect them.

Q. Suppose a strong man seizes my right shoulder and gives it a violent twist that causes me great pain, wouldn't my whole arm stiffen, particularly down to the elbow, involuntarily? A. It might.

Q. If I were standing erect and a man struck me a violent blow on the leg above the knee, wouldn't I stiffen clear to my foot and straighten my leg out

(Testimony of Elmer C. Gross.)

involuntarily? A. You might.

Q. Wouldn't I certainly do it?

A. That is hard to say—it would depend upon the sort of injury. [225]

Q. Now, on this question of the thickening of the bone by the growth of new bone—where there is a considerable thickening following the growing together after a fracture—doesn't that very often result in the stiffening of the member, of the limb or whatever it is?

A. It does if it comes within a joint or if it comes where muscles or ligaments play over the bone.

Q. Isn't it almost the invariable rule, where there has been a violent injury to a bone in any part of the body, particularly of the limbs—and by limbs I include shoulder, although that is probably not accurate,—isn't it true that wherever there has been a serious injury to the bone that in that locality the member of the body is always stiffer, less flexible, in use?

A. Not unless it comes within the joint surface or comes where muscles or ligaments are either attached or play over the bone.

Q. Now, for example—a few years ago in an injury case which we had at Cordova, Doctor Council testifying for the Kennecott Mines Company to an injury to the wrist, what he called and what the other doctors called an infracted fracture—the man had fallen that way (indicating) and the bone was not properly set, as was admitted, in the first place, and Doctor Council had gone over it afterwards.

(Testimony of Elmer C. Gross.)

He admitted in his testimony that while in his opinion the wrist was just as strong, had become just as strong, for lifting purposes, it would never be flexible—don't you think that the same thing is true in this shoulder?

A. Certainly not—there is no comparison between the two places.

Q. Was he probably right when testifying that that bone had thickened as the result of this fracture and the cure of it, to the extent it was cured? [226]

A. Yes.

Q. Doesn't the thickening of the bone in this man's clavicle cause a less agile use of the bone?

A. No, it does not, for the reason that there are no muscles attached there and no ligaments that play over that point and I see no reason whatever for the enlargement of the bone at that point to cause any disability.

Q. You stated, if I understood you correctly, in answer to Mr. Donohoe's questions, that while you did not believe there was any permanent disability resulting from this injury, that you were not prepared to say with absolute certainty that such was the case?

A. I said in my opinion there was none.

Q. Would you assert positively that this man's shoulder is as good now and he would be just as strong in mining, have just as much use, both as to strength and flexibility, of that shoulder as he ever had?

A. As far as I know, I would say "Yes."

(Testimony of Elmer C. Gross.)

Q. You think there is no possibility of any permanent disability or impaired use

A. In my opinion there is not.

Q. Wasn't one of your answers to the effect that it might cause disability and might not?

A. I don't think so.

Q. On your direct examination, if you made that statement, do you now wish to withdraw it?

A. As I remember the way the question was put to me, could the injury to the clavicle cause a permanent disability or might it cause—or an injury about the shoulder I believe it was— and I said an injury might or it might not. [227]

Q. Mr. Donohoe put this question to you— Is the present condition of that shoulder as good as human skill could make it after such an injury as occurred there—that was about the question and if I understood you correctly, you answered “Yes?”

A. Yes.

Q. That is to say, you think that everything was done by Mrs. Tramontin that a skilled surgeon could have done—you say that the result is as good as could have been obtained?

A. I don't know what was done.

Q. You say the result was as good? A. Yes.

Q. You think if yourself or Doctor Willis had attended that shoulder the night the injury occurred, that it would be precisely in the condition now that it is?

A. I think I would be pretty well satisfied if it was.

Q. You don't think you could fix that shoulder

(Testimony of Elmer C. Gross.)

up better than it was done?

A. I don't think I could have got a better union if it was fractured.

Q. Do you think that it was a straight fracture, if there was one?

A. It is impossible for me to say that, I couldn't say definitely there was a fracture there and couldn't say what the character of it was if there was.

Q. You can't say now, either by the sense of touch or anything indicated by the X-ray whether it was a splintered or shattered fracture?

A. No, if it was a clean break I would expect to see quite a definite outline of the ends of the bone.

Q. Now, does a bone thicken by the growth of new bone more in the case of a shattered fracture or a clean one?

A. It depends on how freely new bone is thrown out. In a shattered [228] bone, if you have exposed surface,—you usually get greater enlargement the more surface is exposed; if the bone was shattered with all the raw surface inside, you would not get anything more than a clean break.

Q. Is there always a thickening of the bone after a fracture of any kind? A. Yes, sir.

Q. If a man was to break a bone in the forearm, a clean vertical break, crosswise, and that was set immediately or almost immediately by a skilled surgeon, would there be a thickening of the bone at the union?

A. You practically always get a rim, greater or less, at the point of fracture.

(Testimony of Elmer C. Gross.)

Q. Isn't the growth of new bone in this case much more than ordinary?

A. Not for fractures of the clavicle.

Q. Do you think in any case of a fracture of that kind you would find the same condition as we detected when we had our fingers on the plaintiff's shoulder, a depression and ridge on the inside of the clavicle?

A. Very much the same, because there is a natural depression where the bone turns back; if it was a straight bone, you wouldn't expect the depression to show in the same way when you went over the enlargement.

Q. That falling off of the shoulder from the elevated part is due wholly to the elevation of the bone and not to a depression?

A. To the elevation and the natural depression in the bone behind it.

Q. There is no unnatural depression there?

A. No, I think not.

Q. On this matter of overlapping—you think there is very little [229] overlapping there?

A. I think there is none.

Q. You think there is none?

A. There might be if there was a diagonal fracture,—it might be slipping up to a very small extent, but there is no appreciable extent of overlapping.

Q. There is no overlapping this way, on a horizontal plane, at all? A. No.

Q. There is no protrusion of one end of the bone past the other? A. No.

(Testimony of Elmer C. Gross.)

Q. No indication of that at all? A. No.

Q. And if there was any, would it show in the X-ray, taken anteriorly and posteriorly?

A. Yes, it would.

Q. It would show? A. Yes, sir.

Q. The X-ray shows lights and shadows according to the character of the bone, to some extent?

A. Yes.

Q. For instance, you explained to the jury a while ago that cartilage doesn't show at all in the X-ray?

A. Yes.

Q. If there is a great deal of salts in the bone that makes a darker shadow in the X-ray?

A. The calcium or lime in the bone is what gives it the appearance in an X-ray.

Q. And that is why an X-ray shows bones and doesn't show flesh? A. Yes, sir.

Q. And if there is a great deal of salts in the bone, it makes the X-ray darker? [230]

A. Yes, sir.

Q. And if the calcium is less, does it show darker?

A. It shows denser in the X-ray, not darker.

Q. This X-ray you four doctors took the other day is not a very good X-ray?

A. It was perfectly clear.

Q. You think it is not as good as the two you took at Ellamar?

A. I don't think it is as clear.

Q. Is that due to the fact that the machine was better or was the light or conditions better?

A. I don't know whether there is a difference in

(Testimony of Elmer C. Gross.)

the machines but that is a thing that happens to anybody, that you get a poor picture once in a while—you can't always say just why it is.

Q. It is due to conditions that even doctors do not understand?

A. Yes, you don't always get a good picture.

Q. But all these pictures in a general way show the outline?

A. As far as they are distinct, they show the same thing—there is no difference in the pictures.

Q. A bruise of a bone is simply an injury? That is— A bruise is only to the periosteum—if it reaches to the bone itself, why then it is in the nature of a fracture, is it not?

A. Well, no, not necessarily. Of course you can have an injury to the bone itself without a fracture, as well as the covering of the bone.

Q. A bruise on a bone would be an indentation, wouldn't it, something of that kind?

A. A bruise would, yes, but an injury to the bone—you might have a bump of the bone, causing injury, without a depression.

Q. But if it didn't leave any mark at all, you would hardly call it an injury? A. No. [231]

Q. This injury, whatever the plaintiff suffered, was undoubtedly the result of a violent blow or violent contact with an immovable object?

A. There seems to have been some impact there.

Q. It is about such an injury as you would expect from a man having his shoulder thrown violently against a rock wall?

(Testimony of Elmer C. Gross.)

A. It can come from a deceased condition, tuberculosis, syphilis and those sort of things, but I have no evidence of any such condition.

Q. As far as your observation goes, this man is perfectly normal, except what injury there is to the shoulder? A. Yes, sir.

Q. A very strong, healthy man?

A. Apparently so.

Q. There is no indication of tuberculosis of any impaired condition of the flesh? A. No.

Q. Do you think that that bone fracture or bruise, whatever it was, cured up entirely within a reasonable time? A. Yes, I do.

Q. Is there any difference in the man's condition as it was the 5th of September and as it was when you examined him three days ago—did you notice any difference in his condition?

A. I couldn't make out any.

Q. So far as you could tell by looking at him, your attempt to have him go through exercises and your sense of touch and what is shown by the X-ray, his condition is practically the same as it was in September?

A. The only difference is, in the examination to-day he complains of tenderness at this point (indicating) and never before [232] has he done that.

Mr. DONOHOE.—What point is that?

The WITNESS.—At the point of the deformity. Yesterday when Doctor Boyle was examining him, was the first time he localized pain at that point.

(Testimony of Elmer C. Gross.)

Q. Did any of you doctors ask him any questions in that examination? A. Yes, sir.

Q. Did you ask him whether he suffered pain?

A. Yes.

Q. And he didn't indicate any pain there at that time? A. No.

Q. Did all of you have him go through the same exercises he did this morning?

A. I did; I don't know whether all of them made him go through the same motions or not; they were all present when he went through them, though.

Q. Now, as to this operation. You gave, as I understand it, pretty nearly the same explanation as Doctor Winans does—that it is an operation which is only performed at times when there has been an improper setting of a broken bone and the ends of the bone being calloused over so it would be impossible to grow together except by being freshened or roughened?

A. Yes, and I would add a deceased condition of the bone sometimes requires it.

Q. If there was any gangrene of the flesh you might have to perform an operation, or something of that kind? A. Yes, sir.

Q. Is it possible that at the time he was examined by Doctor Winans and Doctor Dalton, which was some time between February and April of last year—is it possible that there was an unnatural [233] condition then which has become cured of itself?

A. There might have been a condition there which

(Testimony of Elmer C. Gross.)

is not present at the present time.

Q. Supposing there was a fracture of this clavicle on the 12th day of January, 1916, if it had been properly set, or almost perfectly set at that time, do you think the bone must have been thoroughly united and in its present condition by the first of March? A. Yes, sir.

Q. You think there would have been no change in it since that time? A. Not if it was a fracture.

Q. Do you think if the plaintiff wanted to do it that he could go through these exercises or similar ones, such as they put us through in a gymnasium, such as this (indicating)—he could go through these motions as easily and readily as I do, without any difficulty at all?

A. I think he could. I can't find any obstacle to the movement of the arm whatever, except voluntary resistance, that is what my opinion is.

Q. Then you think this voluntary resistance, as you call it, the flinching of the muscles at the time you brought the arms up is an attempt to show he was injured when he was not? A. I do.

Q. You think it is wholly a matter of malingering and you think the man has as free use of his arms and shoulders, both of them, as you have?

A. As near as I can tell, he has, yes.

Q. And he can use his right shoulder as easily as he can the left—as easily as you can?

A. Perhaps better, because I have rheumatism in mine.

Q. As well as any man that hasn't rheumatism?

(Testimony of Elmer C. Gross.)

You think he can [234] use both shoulders as easily as I can? A. Yes, sir.

Q. On this question of measuring the clavicle—the bone, of course, is rounded, something like this globe or shade? A. Something like that.

Q. And it is impossible to say, is it not, unless you would mark it as you mark a stick or wall, that in measuring it from time to time, that you start from the precise point you did before?

A. It is difficult to get it perfectly exact.

Q. You doctors know where the ends of the bone are, but in placing a tape on the rounded surface, you wouldn't say that any two of you would put it in identically the same place?

A. We take the same point, but the point on the bone is rounded, so there could be a variation there.

Q. If the bone is round, geometrically it has no point? A. No.

Q. So you could hardly be certain to place it, place the end of the tape, at exactly the same place?

A. Not within a very small distance.

Q. It is your opinion that his man has not suffered any pain for a good while?

A. I couldn't say he has not suffered pain, he undoubtedly did suffer pain at some time if he had an injury there, which he undoubtedly has.

Q. Since you have known him, you think he has not suffered pain at all?

A. Not as far as I can make out.

Q. And in going through these motions, he has simply been pretending when he said he suffered

(Testimony of Elmer C. Gross.)

pain—none of it is involuntary—is that your idea?

A. That is my idea. [235]

Q. You, of course, suffered no pain while you were putting him through those motions, and you don't think he suffered any more than you did?

A. I don't think he did.

(By Mr. DONOHOE.)

Q. You were present yesterday when Mrs. Tramontin was on the stand? A. Yes, I was.

Q. You observed the movements she testified to that Doctor Duckwall required the plaintiff to perform when he made an examination of him at Ellamar on the tenth day of February, 1916?

A. Yes, sir, I did.

Q. Will you state whether or not those motions, as she testified to them, were the proper motions to ascertain if the right clavicle was broken or there was a separation or any injury to the right shoulder?

A. They were.

Q. I wish you would explain to the jury the function of the clavicle in the human body, if you can—what is it for?

A. The function of the clavicle is sort of a brace between the breast-bone and the point of the shoulder, to keep the shoulder back. If that is broken or taken away, there would be a dropping forward of the shoulder. The function of the clavicle is to keep the shoulder back in this position (indicating).

Q. Now, the clavicle as a bone has no rotary motion? A. No.

Q. Distinguish those kind of bones from other

(Testimony of Elmer C. Gross.)

bones in the human body, if you can.

A. A bone of that sort has a free joint that allows a motion— [236] there are different kinds of joints; there may a motion in one direction, a hinge joint, but a rotary motion would be a joint that would work in any direction, like a shoulder joint.

Q. Would there be anything known to medical science or surgery to indicate that a slight shortening of the clavicle would in any manner interfere with the performance of its natural functions?

A. I can see no reason why it should.

Q. Now, the only perceptible effect of the shortening of the right clavicle would be a slight drooping of the right shoulder forward? A. Yes.

Q. If the shortening was sufficient? A. Yes.

Q. Have you, in your examination of this plaintiff, discovered any drooping forward of his right shoulder? A. No.

(By Mr. RITCHIE.)

Q. In a right-handed man is the right clavicle longer or shorter or precisely the same length usually as the left clavicle?

A. I don't think the fact that he is right-handed has any direct effect upon it. Sometimes one clavicle is slightly longer than the other, it might be either the left or right that is longer. I think as a rule where there is a difference in the size, the right clavicle is usually a little larger than the left.

Q. Does that make its length, as you measure it, a little bit longer? A. It might and might not.

Q. What is your opinion of that statement in

(Testimony of Elmer C. Gross.)

Gray's Anatomy which I had Doctor Boyle read yesterday that in right-handed persons [237] the right clavicle is usually slightly longer than the left—do you think that is true?

A. That may be true.

Q. Then in this case, if the right clavicle at the present time is somewhat shorter than the left, it is not a normal condition in a right-handed man?

A. The statement in the anatomy does not say the right is always longer—a matter of a quarter or half an inch would not have a great effect one way or the other.

Q. I asked you if that is a normal condition for a right-handed man? A. Yes, it is normal.

Saturday, January 5, 1917—Afternoon Session.

Continuation of Recross-examination of Doctor Gross:

(By Mr. RITCHIE.)

Q. Is this alleged injury in the plaintiff's shoulder near the seat of any very sensitive nerves?

A. There is a nerve that runs underneath the clavicle, not particularly in close proximity to this.

Q. Do you think a break, if one occurred there, would have any effect upon the nerves in that immediate locality?

A. Not unless there was a dipping down of the point of the clavicle that would puncture into the tissues underneath.

Q. That would either puncture or produce pressure? A. Yes, sir.

Q. Do you think there is anything about the

(Testimony of Elmer C. Gross.)

growth of new bone or the present condition of that bone that would cause pressure on any of the sensitive nerves?

A. If you had such pressure on the nerve there would be constant pain to impair its function and evidence of that pressure locally. [238]

Q. Do you think the nervous functions are in any way affected by any injury received?

A. I think not—there is no evidence of it whatever.

Q. You think the pain he complains of couldn't arise from any pressure on the nerves?

A. The pain of pressure on the nerve would be constant.

Q. Wouldn't it be exaggerated by motion of the shoulder or arm?

A. If the nerve was severed, for instance, or partially severed, it might result in the paralysis of certain muscles.

(By Mr. DONOHUE.)

Q. Did you discover anything from your examination of the plaintiff, either when you examined him on the 5th day of September, at Ellamar, or when you examined him last Wednesday, that indicated to you that there was any pressure on the nerves?

A. No evidence whatever of any such pressure.

Q. Did the plaintiff in any of those examinations complain to you of a constant pain in the region of the clavicle? A. He did not.

Q. Did he show any indication of any kind of any

(Testimony of Elmer C. Gross.)

constant pain in the region of the clavicle?

A. None whatever.

Witness excused. [239]

Testimony of George Newlove, for Defendant.

GEORGE NEWLOVE, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. DONOHOE.)

Q. What is your name? A. George Newlove.

Q. What is your profession?

A. I am surgeon at Fort Liscum, in the employ of the United States Army.

Q. From what school of medicine and surgery did you graduate?

A. The Medical Chirurgical College, Philadelphia.

Q. What year? A. In 1898.

Q. Were you required to take a course in the army school of medicine also? A. At that time, no.

Q. When did you become a surgeon in the United States Army first? A. The latter part of 1898.

Q. Were you a surgeon in the United States Army at the time of the Spanish war? A. No, sir.

Q. Have you in your experience as a surgeon had occasion to treat patients suffering from various personal injuries? A. Yes, sir.

Q. To what extent has that experience been, if any?

A. It depends on the post I have served; I have had a good deal of experience in cavalry and artillery posts. Of course in the service we are sent to

(Testimony of George Newlove.)

various stations. In infantry stations we don't get quite as much experience in fractures and dislocations as we do in cavalry and artillery, but I think in the length of time I have been in the service, I have had the average [240] experience of a general surgeon in the service.

Q. And that experience is quite extensive, is it?

A. I think so.

Q. Have you had occasion to treat and examine patients suffering from fractured clavicles or dislocation in the bones of the shoulder? A. I have.

Q. To what extent has that experience been?

A. I couldn't tell you the number of cases—I have had quite a number.

Q. Can you make any estimate of about the number of cases you have had in connection with fractured or dislocated clavicles?

A. Well, I wouldn't like to state, but in one post I served at, Fort Sill, I had fifteen dislocations and three fractured clavicles in one month—that was due to the number of recruits that had recently joined.

Q. From your experience as a physician and surgeon, are you at this time able to examine a patient and determine the condition of his clavicle?

A. I think so.

Q. Did you on last Wednesday, the third day of January, 1917, make an examination of the plaintiff, Tony Possus, in the presence of Doctor Boyle, Doctor Winans and Doctor Gross? A. I did.

Q. Just state to the jury and Court what the condition of his right clavicle was at the time you made

(Testimony of George Newlove.)

this examination. Before that, however,—how did you proceed with the examination of this plaintiff?

A. Well, I put him through the regular exercises that we usually do for recruits that are joining the service; that is, practically [241] the same exercises as Doctor Gross demonstrated to the jury.

Q. You were here in court this morning when Doctor Gross testified? A. Yes, sir.

Q. Did you carry on that examination by means of feeling and observing?

A. Yes; I spent about twenty minutes examining him there.

Q. State to the Court and jury what was the condition of his right clavicle at the time you made this examination.

A. Well, when I examined the man I found that about one inch, I should say, from the point where the clavicle articulates with the shoulder blade or scapula there was an undue prominence, and on careful examination I came to the opinion that there had been, either a severe contusion of that bone, which involved the periosteum and probably the bone itself, which caused an excess or enlargement or outgrowth of bone, or possibly there might have a fracture. I further ran my finger down to the end of the fixed portion of the clavicle, where it articulates with the shoulder blade, and found that it was firm and on the various manipulations that I went through with, I kept my hand firmly pressed on this portion of the shoulder, or the portion of the outer extremity where the clavicle articulates with

(Testimony of George Newlove.)

the scapula, and I could find no motion or any displacement or any what we call grating or crepitus, and I was firmly convinced then that the man had a very good union, a strong union.

Q. A very good union of the clavicle had it been fractured?

A. A very good union of the clavicle, had it been fractured, yes.

Q. Now, you found an enlargement of the clavicle at the point you described? A. Yes, sir. [242]

Q. Now, what might that enlargement be due to?

Mr. RITCHIE.—We object to that; he may state what he believes it to be due to.

Q. What do you believe to be the cause of that enlargement?

A. It might have been the result of an old fracture; it might have been the result of an apophysitis or it might have been the result of a periostitis, that is the inflammation of the bone itself or the covering of the bone.

Q. Now, assuming that originally there had been a fractured clavicle at this particular point, what have you to say as to what kind of a union was had of the bone?

A. I think it is a very good union, the average.

Q. What did you discover with regard to overlapping or otherwise?

A. Why, I was present when the part was examined, and I should say roughly that there was probably a quarter of an inch maybe of difference in the

(Testimony of George Newlove.)

two bones, and that the overlapping was not at all to any great extent.

Q. Not more than—

A. Not more than you would ordinarily find in the case of a united fracture.

Q. And from the condition you found there, what would you say in your opinion as to whether the plaintiff had received good care shortly after the accident that caused that fracture or otherwise?

A. Well, from the result, I should say, that he received very good care.

Q. You have had under observation numbers of cases of fractured clavicles, have you not?

A. Yes, sir, I have.

Q. Comparing the condition of this clavicle of the plaintiff at [243] the point of original fracture, if there was a fracture, what would you say as to the condition you there found, as to whether it was an average good union or otherwise?

A. I should say it was an average good union.

Q. Did you detect anything in connection with the union of this clavicle that would lead you to believe that there had been surgical neglect at the time the fracture occurred?

A. Well, from present appearances, it looks to me like a very satisfactory result.

Q. The plaintiff, in performing these manoeuvres or exercises which he was subjected to at this examination, on the 3d day of January, 1917—did he exhibit any pain or claim he was suffering any pain?

A. He claimed that nearly all the motions I had

(Testimony of George Newlove.)

him perform—he complained of pain, at the end of the shoulder.

Q. How far away was that from the original fracture of the clavicle, if there was one?

A. Well, the fracture was probably half an inch or more from where it articulates with the scapula, and I should say about half an inch or so.

Q. From the place where he located the pain?

A. It was right around the tip of the shoulder he complained of pain whenever I put him through any motion; he said he couldn't do it, it hurt him.

Q. Did you have occasion to take his right hand and place it upon his left shoulder? A. I did.

Q. And did you discover any resistance when you put his hand upon his shoulder?

A. I discovered no resistance at the seat of the old injury, but he resisted me at the elbow. [244]

Q. Assuming that he really was suffering pain in the region of the original injury, would you have been able to discover that from the rigidity of the muscles in that region? A. I think so.

Q. And did you discover anything that led you to believe that his resistance came from the seat of the original injury?

A. There was no resistance at the point of the original injury or no muscular resistance.

Q. It is a fact, is it not, that had there been pain in the region of the clavicle, the muscles would have become tense in that section of the body?

Mr. RITCHIE.—We object to that as leading.

(Testimony of George Newlove.)

Objection sustained; defendant allowed an exception.

Q. Doctor, had there been pain at the original seat of the injury, when you placed his right hand upon his left shoulder, would there have been any change in the muscles of that region from which you could ascertain whether there was pain there or not?

A. Well, that depends upon the seat of inflammation; if the man had acute pain, as soon as he moved that arm the muscles would have been thrown voluntarily into a state of contraction—it is simply nature's effort to protect an injured part.

Q. Did you discover anything of that kind in the region of the clavicle that would indicate to you whether there was pain there or not?

A. No, except the man said it hurt him when I placed the arm on his shoulder.

Q. Did you in the course of that examination observe the position of the right and left shoulder?

A. I did.

Q. Was the position of the right shoulder normal or otherwise? [245]

A. The conformation of both shoulders as it appeared to me were normal.

Q. If there had been a serious shortening of the right clavicle by reason of this union, would the right shoulder then be normal or otherwise?

A. The right shoulder would probably, in all probability, droop down and a little forward.

(Testimony of George Newlove.)

Q. What is the function of the clavicle in the human body?

A. Well, the clavicle and the head of the scapula form what is known as the shoulder girdle, and the clavicle acts as a sort of brace to keep the body erect, and it also is the only bony connection between the upper extremity and the trunk—it helps keep the arm in position.

Q. Then, I understand, in case there was any defect in the clavicle or any shortening of it, a material shortening of it, you could detect that from the position of the shoulder? A. I could.

Q. And did you find anything in the condition there to indicate there was a shortening of the clavicle?

A. No, only this examination, which showed that there was a slight difference, but that might happen in anyone. Sometimes the right clavicle is larger than the left and sometimes it is not; a good deal depends upon a man's vocation. If a man is a laborer sometimes one bone is enlarged, because the muscles on that side are developed to a greater extent than they are on the other.

Q. Now, you found a slight difference in the measurement of the right clavicle and the left clavicle, did you? A. I did, a slight difference.

Q. About what was that difference?

A. If I remember correctly, about a quarter of an inch. [246]

Q. From your examination of the plaintiff, did you discover any defect in his right clavicle or right

(Testimony of George Newlove.)

shoulder that would, in your opinion, permanently disable him? A. In my opinion, no.

Q. What is your opinion, from your examination, as to the plaintiff's ability at this time to use his arm as freely as an arm is ordinarily used, or an ordinary arm is used?

A. Well, I think the man could use it if he tried.

Q. Did you discover anything from your examination that would lead you to believe that owing to any defect in the plaintiff's right clavicle or right shoulder, it would prevent him from having his normal strength and use of his right arm and right shoulder? A. No.

Q. Doctor, you have observed patients, have you, from time to time, who had their right clavicles fractured and a union effected, and have observed as to whether or not the use of the right arm and shoulder would be impaired to any degree? A. I have.

Q. And what is your experience in regard to those observations?

A. As a general rule, in most cases, they recover entirely.

Q. About how long does it ordinarily take for a good healthy man, for his clavicle, when fractured, to reunite?

A. That depends a good deal upon the man's constitution—a good healthy man, I would say, would have a good strong bony union in three or four weeks, but of course the arm would still be weak and he would have to care for it for perhaps four

(Testimony of George Newlove.)

weeks or six weeks, maybe; he would have a good strong bony union there inside of three weeks.

Q. Since you examined the plaintiff on the third day of January [247] have you had occasion to examine another man whose right clavicle was fractured and a union affected? A. I have.

Mr. RITCHIE.—We move to strike the answer and interpose the objection that it is irrelevant and immaterial—the doctor has already testified that there is a good deal of variance between clavicles and individuals.

Mr. DONOHOE.—We propose to follow this testimony by placing a man on the stand by whom we will demonstrate that the overlapping of his right shoulder, his right clavicle, far exceeds any overlapping claimed in this case of the plaintiff and will demonstrate to this jury that he has absolutely free and complete use of his arms in any manner he sees fit to use them, and we will propose later on to place these two men, this man and the plaintiff, side by side, before this jury so they can see absolutely the condition of the two clavicles and the use of their respective arms.

After argument by counsel the motion to strike the answer was by the Court granted and the objection sustained. To which ruling of the court counsel for defendant was allowed an exception.

Q. Doctor, in this examination of the man referred to in the last question, did you discover whether or not in the union of the clavicle, there was an overlap-

(Testimony of George Newlove.)

ping of the two ends of the bone?

Mr. RITCHIE.—We object to this question as to all similar questions on the ground that Doctor Newlove qualified as an expert on this and he can testify either from his general knowledge of a great many cases or what he has learned from the books as to the results of overlapping or any other condition, but to take a particular isolated case and state that in that case something [248] similar has not resulted in a permanent injury would be simply making all cases stand as an exception. The objection was by the Court sustained; to which ruling of the Court counsel for defendant is allowed an exception.

Q. In the examination of this man, did you find an overlapping? A. Which man?

Q. I am speaking of the man you examined since you examined the plaintiff—In the examination of this man, did you discover that in the union of his right clavicle the ends of the bones overlapped half an inch?

Same objection; objection sustained; defendant allowed an exception to the ruling.

Q. Doctor, will you name the man whom you have examined since examining the plaintiff who had an overlapping of his right clavicle in effecting a union after a fracture?

Mr. RITCHIE.—We object as irrelevant and immaterial.

Objection sustained; defendant allowed an exception.

Mr. DONOHOE.—That is all.

(Testimony of George Newlove.)

Cross-examination.

(By Mr. RITCHIE.)

Q. In the examination of the plaintiff in Doctor Boyle's office on the third of January, 1917, when you measured the plaintiff's clavicle, you made the actual measurement yourself? A. Yes, sir.

Q. Did you not at that time state that your estimate of the difference in length of the two clavicles was three-eighths of an inch? A. No.

Q. You are quite sure you did not?

A. I am quite sure of that. [249]

Q. Was the measurement made more than once?

A. Yes, sir, it was, if I remember correctly; I think we all made it a time or two.

Q. And did you all agree it was a quarter of an inch or a little more?

A. As I remember, I think we were all of about the same opinion.

Q. You are sure you didn't decide it was three-eighths? A. I am quite sure.

Q. There is no possibility of your being mistaken?

A. Of course, there might be; in a muscular man, the part being covered with muscles, there might be a fraction of an inch one way or the other.

Q. There is hardly any chance of your being mistaken in your statement?

A. I don't think so; if I remember right, one side was $5\frac{1}{2}$ and the other $5\frac{1}{4}$.

Q. As a matter of fact, on account of the end of the bone being rounded, it would be difficult for a skilled surgeon to be mathematically exact in placing the

(Testimony of George Newlove.)

tape each time in the same location, the exact location? A. I should think so.

Q. You might measure it half a dozen times and get a slight variation each time?

A. Yes, sir, a fraction of an inch.

Q. You spoke a while ago of it being probable, in the case of the use of the right shoulder in hard muscular exertions, such as a laboring man uses it, that the bone would be slightly enlarged?

A. It might be.

Q. Is it or is it not true, in the case of a man who has earned his livelihood by hard manual labor that the right clavicle, he [250] being a right-handed man, is slightly larger than the left?

A. It might be possible.

Q. And in that case, then, it would be abnormal for the left clavicle to be found a quarter of an inch longer than the right clavicle, would it not?

A. In that case, it would be.

Q. It is probably true that an abnormality is not always an evidence of weakness? A. No.

Q. But it would be very unusual if the left clavicle was larger and longer than the right in a right-handed man?

A. Well, of course, you know in the formation of our anatomy there are slight variations in the size of bones. There might be a slight variation in the size of the bones of your arms and legs—there might be a quarter of an inch difference in the lengths or an eighth of an inch.

Q. Did you give an estimate of the extent of the

(Testimony of George Newlove.)

overlapping of the bone there?

A. I don't think there was any overlapping any more than you would expect to find in a fracture. Of course in a fracture there is an accumulation of ring callous and is bound to be in all cases of fracture. If it is of long duration by careful examination you can detect a little hardening or a little elevated surface.

Q. You are explaining, which is perfectly legitimate, but you do not quite answer my question, which was, what was the extent of the overlapping that you detected? A. It was very small.

Q. You have stated that you think there is a fairly perfect union of the bone there, whether there was an actual fracture or merely a contusion, which perhaps in its effects would amount to a [251] slight fracture, would it not? A. Yes.

Q. And you think there has been a fairly perfect union? A. Yes, a very good union.

Q. Is it not true that a bone which is not quite properly set in a perfectly healthy man would be very slow of healing and consequently would become in time perfectly sound but a little bit malformed?

A. That would depend upon the degree of displacement.

Q. If there was a very slight displacement—supposing that a person, not an expert in that business, used the best skill he could and got very nearly a normal replacement of the fractured member; if it was a strong man, wouldn't the reunion, so far as a healthy bone was concerned, be perfect and yet there would be a slight malformation which might amount to a

(Testimony of George Newlove.)

lameness or impairment of the use of the limb or the member?

A. I should say that thing would be more liable to happen in a weak or emaciated person than a man muscular and healthy.

Q. But the point is this—if the replacement of the injured member was not quite perfect, it would be much longer in healing than if perfectly set?

A. I don't know that it would be any longer in healing; the number of days or weeks intervening would probably be about the same unless there was some foreign matter got between the two and prevented the union.

Q. In the case of a slight misplacement, would that stimulate a greater growth of new bone?

A. It might.

Q. Wouldn't that be the probable result?

A. It might cause it.

Q. And if the bone was set or attempted to be reset in that way, with [252] a slight misplacement, it would very likely result in a great thickening of the bone there through the growth of new bone and to some extent an overlapping? A. It might.

Q. Isn't that the probable result?

A. It very often happens that way, yes.

Q. Nature is a greater healer itself, especially in healthy persons and young persons? A. Yes, sir.

Q. The defects in surgery are often overcome by the power of nature itself, isn't that true—slight defects, I mean? A. Yes, sometimes—slight defects.

(Testimony of George Newlove.)

Q. This is the case of a man who is thirty-three years old. A. Yes.

Q. He is a strong muscular man, is he not, apparently? A. Yes, sir.

Q. And as far as you are able to detect in perfect health? A. Yes, sir.

Q. And if this bone of his was fractured or severely contused and was not treated with good, perfect, surgical skill, nature in his case, could overcome that defect?

A. No, not unless the bones were in apposition.

Q. Would they have to be in exact apposition or approximate apposition?

A. If they were in approximate apposition, you would get quite a deformity there.

Q. Would the apposition have to be perfect?

A. It would have to be more or less perfect to get a good result.

Q. In putting him through these exercises, did you have him do it rapidly? [253]

A. I don't know how rapidly—ordinarily they are.

Q. You were here when Doctor Gross was demonstrating this morning? A. I was.

Q. And he had him place his arms this way (indicating)? A. Yes, sir.

Q. And that way (indicating)? A. Yes, sir.

Q. That is, he had him place his right hand on his left shoulder, rather slowly? A. Yes.

Q. And his left hand on his right shoulder rather slowly; to extend his hands forward almost hori-

(Testimony of George Newlove.)

zontally so his arms were outstretched, slowly, and put his arms backward, toward his back, and that was done slowly—suppose he went through all those movements rapidly, wouldn't it cause him pain, if there was anything wrong with him?

A. If there was anything wrong with the joint, it probably would.

Q. When you put him through those exercises, did you have him do it rapidly? Like this (indicating)?

A. No, not like that—in the ordinary way. I said, "Extend your arms," and put him through the regular motions.

Q. Did you have him go through it as rapidly and with the precision a man would go through ordinary exercises in a gymnasium? A. No.

Q. Do you think he could do that?

A. I think so.

Q. Do you think he can raise his right arm straight up, as I have mine now, so it is very nearly vertical?

A. In my opinion he has a perfect function there if he wants to use it. [254]

Q. Will you answer Yes or No?

A. Yes, I think he can.

Q. Could he put his arm up with a jerk as I did then?

A. Perhaps not quite with a jerk but I think he can extend his arm, if he wants to.

Q. If you had examined this man last Wednesday as a proposed recruit for the army, would you have passed him?

A. The way I will answer that question is this—I

(Testimony of George Newlove.)

believe if that man came to the recruiting office as a recruit, I don't think he would complain of these symptoms.

Q. Would you take him as a recruit for the army?

A. As far as the malformation is concerned, I would.

Q. As far as the use of his arm is concerned—do you think he could handle a sabre in the cavalry?

A. The way he goes through the movements in my presence, no, but from the testimony of Doctor Gross, who examined him last September and the testimony of Doctor Duckwall, who examined him three weeks after the injury, I would say, yes. Now, a man complains of pain and of course refrains from going through these particular motions, but a man who is anxious to go into the service, wouldn't appear before a recruiting officer if he had anything that he thought would cause an objection.

Q. Do you think he could go through the tactics of a soldier, if he understood them or knew them?

A. In my opinion, I think he could.

Q. You think, then, that his failure to use his right arm as freely as you and I can do with ours, is due either to unwillingness or a positive refusal to do so?

A. In my opinion, I think it is unwillingness.

Q. You think his ills are to some extent imaginary?
[255] A. I think so.

Q. You are not prepared to say, though, that at this time he has perfect use of his right arm and shoulder—the arm hasn't anything to do with it except so far as it is dependent on the shoulder?

(Testimony of George Newlove.)

A. He apparently, to me, in my presence, refused to go through the exercises; in other words, he hesitates about performing the proper functions of the joint, but I can, with passive motion, put him through all the motions. I can extend the arm and rotate it and work the arm in any position I want to. If there was any displacement or any ununited fracture or any inflammation of the bones or the covering surrounding the bone or any adhesions there at all, or rupture of the ligaments, which bind down the joint—this portion of the clavicle is fixed or immovable; the movable portion is the inner two-thirds or sternal end. In other words, when you move up your shoulder, the motion is here (indicating). If he had a condition of that kind, I couldn't do that—he would suffer excruciating pain.

Q. Do you think there is any possibility that there is a slight stiffening of the shoulder, as the result of this fracture, or whatever the injury was, and the thickening of the bone?

A. I am not prepared to say, there might be some little outgrowth there, but if there was anything of that kind, it could easily be relieved by proper treatment.

Q. Do you think he has as flexible use of his shoulder as he formerly had?

A. I think by proper massage and if he worked that arm, that arm would be in as good condition as his other arm.

Q. Would that take considerable time?

A. I couldn't exactly state as to the time. [256]

(Testimony of George Newlove.)

Q. It is much more common for a fractured bone to recover its normal strength than for the member to which it belongs to recover the original flexibility, is it not?

A. That is true, but in this case, the fracture, or the bruise, we may call it, or whatever it was, is away from the articulation.

(By Mr. DONOHOE.)

Q. If you were called upon to treat this case, and the plaintiff complained of the pain he has complained of to you, in your examination, what sort of treatment would you prescribe?

A. Massage, stimulating liniments, probably application of heat.

Q. Mr. Ritchie asked you if you would pass a recruit in the army who had a malformation of his right clavicle to the extent that this plaintiff has—I will ask you if it is not a fact that H. W. Ells, a present enlisted man at Fort Liscum, has a right clavicle that is much more malformed than the plaintiff's right clavicle?

Mr. RITCHIE.—We object to that as irrelevant and immaterial.

The COURT.—On the redirect examination it becomes admissible; objection overruled. Plaintiff allowed an exception.

A. He has.

Q. I will ask you, Doctor, if H. W. Ells has any difficulty in going through the manoeuvres of exercises prescribed by the army and particularly in using his right arm and right shoulder.

(Testimony of George Newlove.)

Mr. RITCHIE.—Same objection.

The COURT.—It should be limited and is limited to the one question, whether he would admit such a person. He was asked that question and now you have designated the person whom he has testified has a much greater malformation—everything would be covered by his statement that he would admit him to the service. The objection will be sustained.

Defendant allowed an exception to the ruling.
[257]

Q. Have you, since the examination you made of the plaintiff on the third day of January, 1917, made an examination of H. W. Ells in regard to his right clavicle?

Mr. RITCHIE.—We object to that as incompetent and irrelevant.

Objection sustained; defendant allowed an exception.

Witness excused.

Testimony of Harry W. Ells, for Defendant.

HARRY W. ELLS, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. DONOHOE.)

Q. What is your name? A. Harry W. Ells.

Q. Where do you reside at this time?

A. At Dodge City, Kansas.

Q. Are you connected with Fort Liscum Army Post? A. I am.

Q. And a member of the United States Army?

(Testimony of Harry W. Ells.)

A. Yes, sir.

Q. How old are you?

A. Twenty-one years old.

Q. Did you some time ago receive a fracture of your right clavicle or collar-bone?

Mr. RITCHIE.—We object to that as incompetent and irrelevant.

Objection sustained; defendant allowed an exception.

Q. How long after receiving an injury that resulted in the fracture of the right clavicle was it before you resumed work?

Same objection. [258]

The COURT.—The objection will be sustained. He has not testified he had a broken clavicle.

Mr. DONOHOE.—I know, but I don't know how else I can get this into the record.

The COURT.—In order that counsel may understand the Court's position, it is simply this: You have called expert witnesses to testify from their knowledge and their experience. Now, it certainly would not be proper, on the theory of expert witnesses, to now call in the parties from whom they may have gained their experience. They have testified as expert witnesses.

Mr. DONOHOE.—No, I do not propose to do that. In the examination yesterday, Doctor Boyle was permitted to have the plaintiff take his clothing off the upper part of his body and was permitted to demonstrate to the jury a depression in his shoulder and to demonstrate in the shoulder what he called a

(Testimony of Harry W. Ells.)

malformation of the collar-bone or clavicle. With this witness I propose to demonstrate a greater depression and a greater malformation of the clavicle, demonstrate positively that the overlapping of the clavicle in the union was half an inch, and then demonstrate by this man that he hasn't the slightest bit of trouble using his right arm in any manner conceivable, and further, propose to stand the two men up there, side by side, so the jury could examine them and pass upon them themselves. It is a demonstration, not expert testimony—just as the plaintiff had the right to put in a photograph of the right clavicle from a book on anatomy—we certainly have the right to introduce this witness for that purpose. * * * I am endeavoring to show to this jury the improbability that this plaintiff's arm is affected the least bit by the malformation he claims in his clavicle, by showing another man who has a [259] similar or more extensive malformation, who has the full use of his arm.

The COURT.—The objection will be sustained and defendant allowed an exception.

Q. Did you enter the United States Army as a recruit subsequent to receiving a fracture in the right clavicle?

Mr. RITCHIE.—We object as incompetent and irrelevant.

Objection sustained; defendant allowed an exception.

Q. Have you any difficulty in using your right arm in any position you choose to use it in?

(Testimony of Harry W. Ells.)

Same objection; objection sustained; defendant allowed an exception to the ruling.

Q. Have you any difficulty in extending your right arm perpendicularly over your head and shoulders?

Same objection; objection sustained; defendant allowed an exception to the ruling.

Witness excused.

Mr. DONOHOE.—Defendant rests.

Mr. RITCHIE.—Before defendant rests I ask permission to recall Doctor Gross for further cross-examination.

(No objection.)

**Testimony of Elmer C. Gross, for Defendant
(Recalled—Cross-examination).**

Doctor GROSS, recalled for further cross-examination.

(By Mr. RITCHIE.)

Q. I am not sure whether I asked you this question or not— In the examination that you made of the plaintiff on last Wednesday in Doctor Boyle's office, did you have the plaintiff extend his right arm upward, vertically, as far as he could, like this?

A. Yes, sir, I did.

Q. Was he able to do it, unassisted?

A. He wouldn't do it; he didn't do it unassisted.

[260]

Q. In each instance one of you doctors raised the arm for him? A. Yes, sir.

Q. Did you try to make him throw his arm up quickly like that (indicating)?

A. I don't think any of these movements were

(Testimony of Elmer C. Gross.)

hurried—he was simply asked to do it.

Witness excused.

DEFENDANT RESTS.

REBUTTAL.

Mr. RITCHIE.—I just want to be sworn to make a statement, with permission to address the jury afterwards.

Mr. DONOHOE.—No objection.

Testimony of E. E. Ritchie, Plaintiff (in Rebuttal).

E. E. RITCHIE, sworn as a witness in behalf of the plaintiff, in rebuttal, testified as follows:

(Examination by Mr. LYONS.)

Q. You are one of the attorneys for the plaintiff in this case? A. I am.

Q. You had some correspondence with Messrs. Donohoe & Dimond with reference to having the plaintiff here go to Ellamar to be examined by a physician? A. Yes.

Q. Will you please tell the jury what talk you had about the matter?

A. I simply want to make some statements I made—

Mr. DONOHOE.—We object to any statements made to us; it would be self-serving declarations.

The WITNESS.—I mean at the time you stated that you were representing the Ellamar Mining Company and I had been referred by letter to you. I want to make an explanation in regard to [261] this correspondence.

The COURT.—The correspondence itself appears in the pleadings.

(Testimony of E. E. Ritchie.)

The WITNESS.—The original letters are put in evidence, which were in my possession. I want to repeat the statements I made to Donohoe & Dimond at the time of this correspondence.

Mr. DONOHOE.—I object to any such statements; he may have talked to Mr. Dimond at some time; I know nothing about that.

The COURT.—It seems to me any statements which may have been made, leading up to any communications which are admitted in the pleadings or the evidence, would be incompetent.

The WITNESS.—They are simply referring to the proposition to have this man go down there and be examined at Ellamar.

Mr. DONOHOE.—I object to any such statements. I don't know what they are; I have no recollection of any particular statements being made to me and Mr. Dimond is not here.

Objection sustained; plaintiff allowed an exception to the ruling.

Witness excused.

EVIDENCE CLOSED.

Recess until this evening at eight o'clock. [262]

Saturday, January 6, 1917—Evening Session.

Instructions of Court to Jury.

By the COURT:

Gentlemen of the Jury: You are instructed that in this case the judge and jury have separate though important functions to perform. It is your duty to weigh and consider the evidence, all of which is addressed to you. It is the duty of the Judge of this

Court to instruct you as to the law in the case, and you are required to accept as the law what is given you as such by the Court, and upon the law and the evidence, to render a just and true verdict as you have sworn to do.

Your power of judging the effect of evidence is not arbitrary, but is to be exercised by you with legal discretion and in subordination to the rules of evidence.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number, or against a presumption, or other evidence, satisfying to your minds.

2.

In civil cases the affirmative of the issue shall be proved and when the evidence is contradictory, the finding shall be according to the preponderance of the evidence.

The law says that unless the plaintiff satisfies you throughout the entire case of the correctness of his story to such an extent that it outweighs the proof of the defendant, he cannot recover. In other words, if the testimony is evenly balanced, it shows that there is some doubt in your minds. That is not sufficient. That is, if the testimony of the plaintiff weighs [263] just the same as that of the defendant, you must find for the defendant. The plaintiff can only recover where his testimony outweighs that of the defendant.

Where the Answer of the defendant contains an affirmative defense or defenses, the burden of estab-

lishing the same by a fair preponderance of the evidence is upon the defendant. In other words, in order to avail itself of the affirmative defenses set up in its Answer, the defendant must establish the same by a fair preponderance of the evidence submitted to you to prove such defenses.

3.

You are instructed that evidence is to be estimated, not only by its own intrinsic weight, but also according to the evidence which it is within the power of the one side to produce and of the other to contradict, and, therefore, if the weaker and less satisfying evidence is offered when it appears that the stronger and more satisfactory evidence was within the power of the party offering the same, the evidence so offered should be viewed with distrust.

4.

You are instructed that certain evidence was admitted for your consideration for limited purposes only and that at the time of its admission your attention was directed to the limited purposes for which it was admitted. Such evidence must be considered by you for the limited purposes only for which it was admitted. [264]

5.

You are instructed that a witness wilfully false in one part of his testimony may be distrusted in others, and if you find that a witness has wilfully testified falsely in one part of his testimony, you may reject all or any part of his testimony, but you are not bound so to do. You should reject the false part and give such weight to other parts as you may think

they are entitled to receive at your hands.

You should not fail to weigh and consider and give proper effect to all the evidence in the case which you believe to be truthful. It is your duty to determine what is the truth of the testimony presented and upon the facts of the case, to render a verdict accordingly.

6.

In determining the credit you will give a witness and the weight and value you will attach to a witness' testimony, you should take into consideration the conduct and appearance of the witness upon the stand, the interest of the witness, if any, in the result of the trial, his feeling for or against any of the parties to the action, the probability or improbability of the witness' statements, the opportunity he had to observe and to be informed as to matters respecting which he testified, and the inclination he evidenced in your judgment to speak truthfully or otherwise concerning the matters within the knowledge of such witness.

7.

The law you will be required to apply to the facts you will find in determining the measure of liability attaching [265] to the defendant in the first cause of action is as follows:

“Where any such employee receiving an injury arising out of, and in the course of his or her employment, as the result of which he or she is totally and permanently disabled, he or she shall be entitled to receive compensation as follows: * * *

(b) If such employee at the time of his injury had no wife or children, but had a mother or father

dependent upon him, Four Thousand Two Hundred (\$2400.00) Dollars. * * *

(e) In those cases where such employee so injured at the time of his injury was unmarried and had no children nor father nor mother dependent upon him, he shall receive the sum of Three Thousand Six Hundred (\$3600.00) Dollars. * * *

For all other injuries (the injury in this case not being within the schedule of injuries) causing temporary disability, the employer shall pay to the employee, during the period of such disability, fifty per cent (50%) of his daily average wages. Provided, however, that the period for the payment for temporary disability shall not exceed six (6) months. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, and the employee has been paid compensation for temporary disability, the amount so paid him shall be deducted from the amount to which he shall be entitled under such provision in this schedule. * * *

Whenever such employee receives an injury, arising out of and in the course of employment, as a result of which he or she is partially disabled, and the disability so received is such as to be permanent in character and such as not to come wholly within any of the specific cases for which provision is herein made, such employee shall be entitled to receive as compensation a sum which bears the same relation to the amount he or she would be entitled to receive hereunder if he or she were totally or permanently

disabled, that the loss of earning capacity of such employee, by reason of the accident, bears to the earning capacity such employee would have had had he or she not been injured, the amount to be paid in no case to exceed Four Thousand Eight Hundred (\$4800.00) Dollars.

To illustrate: If said employee were of a class that would entitle him or her to Four Thousand Eight Hundred (\$4800.00) Dollars under this schedule, if he or she were totally and permanently disabled and his or her injury would be such as to reduce his or her earning capacity twenty-five (25%) per cent, he or she would be entitled to receive One Thousand Two Hundred (\$1200.00) Dollars; it being the amount that bears the same relation to Four Thousand Eight Hundred (\$4800.00) Dollars that twenty-five (25%) per cent does to one hundred (100%) per cent. Should such employee receive an injury that would impair his or her earning capacity seventy-five (75%) per cent, he or she would be entitled to receive Three Thousand Six Hundred [266] (\$3600.00) Dollars; it being the amount that bears the same relation to Four Thousand Eight Hundred (\$4800.00) Dollars that seventy-five (75%) per cent does to one hundred (100%) per cent. * * *

Section 24. The employee shall, after an injury at reasonable times during the continuance of his or her disability, if so requested by his or her employer, submit himself or herself to an examination by a physician or surgeon authorized to practice medicine under the laws of the Territory of Alaska, furnished

and paid for by the employer. The employee shall have the right to have a physician, provided and paid for by himself, or herself, present at such examination or examination. If any employee refuses to submit himself or herself to any such examination or examinations provided for in this Act, or in any way obstructs any such examination or examinations, his or her rights to compensation shall be suspended, and his or her compensation, during such period of suspension, may, in the discretion of the jury or Court determining an action brought for the recovery of compensation under this Act, be forfeited.”

8.

You are instructed that plaintiff's first cause of action is a special proceeding brought pursuant to the provisions of Chapter 71 of the Session Laws of the Territory of Alaska for the year 1915 and is brought for the purpose of determining the amount of compensation that the plaintiff is entitled to receive for any injury he may have sustained in an accident occurring on the 12th day of January, 1916, in the defendant company's mine at Ellamar, Alaska, arising out of and in the course of his employment as a miner for defendant in its mining operations.

Under the Compensation Law it does not matter or concern you as to who was responsible for the accident, therefore you will not consider that subject. The defendant admits that the plaintiff did receive some injury in the accident on the 12th day of January, 1916, while in the course of his employment as a miner and the only question for you to determine is the extent [267] of these injuries, as to whether

they caused a temporary disability, and if so, the duration of said temporary disability, or a permanent disability, and if a permanent disability, to what extent has his ability to earn money as a miner been permanently decreased by the injury, and one other question, did the plaintiff at the time of the injury have a mother dependent upon him for support.

9.

You will observe from the pleadings that the plaintiff in the First cause of action, in his Third Amended Complaint, claims compensation for a permanent disability in the sum of \$1400, said sum being $33\frac{1}{3}\%$ of \$4200. This claim arises in the following manner: First, If being single and no one dependent upon him, in the event of permanent total disability, he would be entitled to receive \$3,600; second, If single, with a mother dependent upon him at the time of his injury, and if said injury effected a permanent total disability, he would be entitled to receive \$4,200.

The position taken by the defendant is that the injury as such did not cause a permanent partial disability but caused a temporary disability for a period of one hundred and five days, for which said temporary disability the plaintiff is entitled to receive from the defendant 50% of \$4 per day for 105 days, or the sum of \$210.

From the evidence submitted relative to the first cause of action, and you are instructed that any evidence of negligence or malpractice complained of in the second cause of action is to be eliminated by you in determining what the [268] facts are in the

first cause of action, you will proceed to find what compensation the plaintiff is entitled to receive under his first cause of action by determining:

- First. Had the plaintiff a mother dependent upon him at the time of his injury?
- Second. Did such injury, as such, cause a permanent partial disability?
- Third. If it did cause a permanent partial disability, by what per cent did it reduce plaintiff's earning capacity?
- Fourth. Did such injury as such cause a temporary disability?
- Fifth. If it did cause a temporary disability, what was the period of time, expressed in days, of such temporary disability?
- Sixth. Did the plaintiff during his period of temporary disability, if you find by a fair preponderance of the evidence that he suffered a temporary disability, refuse to submit himself to an examination by a physician or surgeon or in any way obstruct any such examination, under the provisions of Section 24, hereinbefore set forth?
- Seventh. If you find that the plaintiff, during a period of temporary disability caused by said injury as such, did refuse to submit himself to an examination by a physician or surgeon, or did obstruct any such examination under the provisions of said Section 24, for what period of time in days in your judgment

shall the plaintiff forfeit his right to compensation, providing you find there should be any forfeiture declared by you?

10.

Having proceeded as above indicated, you will then determine what compensation plaintiff is to receive under his first cause of action. And in order that the Court may determine the correctness of your computation in arriving at the compensation you award the plaintiff on his first cause of action, special findings covering the above seven questions for your consideration will be submitted to you and will be [269] returned answered by you, together with your verdict in the case.

11.

You are instructed that an employer has a legal right to require an employee who claims from him compensation or damages because of alleged injuries sustained in the course of employment, to submit to physical examination at reasonable times, in order that the employer may inform himself of the nature and extent of the injuries in question.

You are instructed that if the defendant in this case denied the existence of injuries or disability suffered by plaintiff while in its employment and refused him any further surgical or medical care, plaintiff thereupon became entitled to leave defendant's premises and to control his own movements, and defendant could not thereafter require him to return for any purpose. This would be equally true if he left defendant's premises on defendant's order.

If you find for the evidence that defendant at any time after the accident in this case discharged plaintiff from its hospital and refused him further surgical and medical care, and he thereupon came to Valdez, it could not require him thereafter to go to Ellamar for examination, but it could at reasonable times require him to submit to examinations wherever it might find him, by a competent surgeon of its own selection.

In this connection you are also instructed that you may take into consideration defendant's offer to furnish transportation for plaintiff from Valdez to Ellamar and return, if you find such an offer was made, and plaintiff's refusal to go, if [270] you find there was such a refusal, in determining whether or not plaintiff, at a reasonable time, obstructed any physical examination proposed to be made by the defendant.

12.

I instruct you that the phrase "temporary disability" means such a disability, not permanent in character, but which incapacitates the plaintiff from earning full wages for a limited period of time, and the phrase "permanent disability" means such a disability as would incapacitate the plaintiff from earning full wages for the remainder of his life.

13.

I instruct you that the word "dependent" means "One who is sustained by another or one who relies upon another for support."

Before you can find that the plaintiff's mother as alleged was dependent upon plaintiff, you must find

by a fair preponderance of the evidence that at the time of the injury, or for a reasonable time immediately prior thereto, plaintiff was supporting her and that she was relying upon plaintiff for her support.

14.

The Court will now direct your attention to the second cause of action set forth in plaintiff's complaint. This cause of action is separate and distinct from plaintiff's [271] first cause of action and must so be considered by you.

In brief, plaintiff alleges that by virtue of an arrangement existing between the defendant and plaintiff, the sum of \$1.50 per month was deducted from the wages of plaintiff, entitling him to care in a hospital and to competent surgical and medical attendance at the expense of defendant, in case of his injury or illness arising in the course of his employment; that he was injured as set forth in his first cause of action; that upon admission, and during his stay there, no competent surgical and medical attendance was given him; that when discharged from defendant's hospital, his physical condition was greatly impaired beyond the normal result of his original injury and this on account of the gross and wilful negligence of the defendant to furnish him the competent surgical and medical attendance to which he was entitled as aforesaid; that because of defendant's neglect and refusal to furnish him timely and sufficient surgical care and medical and hospital service, which aggravated the result of his

original injuries as aforesaid, and his permanent disability and the unnecessary physical and mental suffering he has undergone he has been damaged \$15,000; that he has suffered great physical pain, and mental torture and still suffers some pain, other than what would naturally have resulted from his original injury, on account of defendant's refusal and failure to give him competent surgical and medical attendance to which he was entitled.

15.

The defendant denies any liability under plaintiff's second cause of action; affirmatively pleads a proper discharge of [272] all obligations devolving upon it by virtue of the arrangement between plaintiff and defendant for competent surgical and medical attendance, to be furnished plaintiff at defendant's expense for any injury or illness arising in the course of plaintiff's employment by defendant; affirmatively, as a defense, pleads an offer to furnish plaintiff competent medical attendance to entirely relieve him of his alleged soreness complained of upon examination, and that plaintiff refused said offer. Plaintiff by his Reply generally denies the affirmative matter set up by defendant.

16.

You are instructed that the arrangement whereby defendant deducted \$1.50 per month from plaintiff's wages for hospital purposes as set forth in the pleadings herein was, if not repudiated by plaintiff, in effect a contract binding the defendant, at defendant's expense, to furnish plaintiff competent surgical and medical attendance, free of charge, for any

injury or illness arising in the course of his employment with defendant, providing that in the event of no specific agreement to the contrary, defendant would not be required to make unusual or unnecessary expenditures but only such as the requirements of the case in the opinion of competent physicians justly demanded.

17.

The parties being brought into this relation above described the plaintiff may maintain an action for the breach of the implied obligation caused by unskilful, negligent or [273] improper treatment on the part of the defendant, which action is known in law as a tort, and if the plaintiff proves the allegations of his second cause of action by a fair preponderance of the evidence, he is entitled to recover damages caused by the unnecessary physical pain, mental (torture) suffering and physical disability suffered by him through defendant's negligence or malpractice.

18.

You are instructed that if you find from the evidence that the ordinary, natural results of plaintiff's original injury were aggravated by the failure and refusal of defendant to give him competent surgical and medical care, then your verdict must be for the plaintiff under the second cause of action, and you will then fix his damages at such sum as will reasonably compensate him for injury due to that cause; that is, such a sum as will reasonably compensate him for impairment of his earning power, if you

find his earning power has been impaired by the cause mentioned, and physical and mental suffering to which he has been subjected, if any, due to that cause.

If you find that plaintiff has suffered either temporary or permanent impairment of his earning power, either partial or total, because of the failure and refusal of the defendant to give him competent surgical and medical care after his original injury, he will be entitled to recover damages under his second cause of action, which you will fix according to your estimate of the sum that will compensate him for such impairment. [274]

19.

The plaintiff in this case has offered in evidence, pursuant to a stipulation with the defendant, a statement of the testimony of Dr. W. H. Chase and I instruct you that this statement is legal evidence on behalf of the plaintiff and has the same force and effect as if Doctor Chase were present in court and testified orally before you on oath; and you are bound to give his testimony the same force and effect and consideration that you would give were the witness present in court and testified orally.

20.

The defendant in this case has offered in evidence pursuant to a stipulation with the plaintiff a statement of the testimony of Dr. Bertram F. Duckwall and I instruct you that this statement is legal evidence on behalf of the defendant and has the same force and effect as if Doctor Duckwall was present in court and testified orally before you on oath; and

you are bound to give his testimony the same force and effect and consideration that you would give were the witness present in court and testified orally.

21.

You are instructed that an act of negligence if it produces no evil results will not subject the one committing such an act to liability for damages, for if there is no actual damage, there can be no recovery, be the act ever so negligent; if, therefore, the defendant did commit acts of negligence or malpractice [275] involving the rights of the plaintiff, but if the same caused no damage capable of determination by you, there can be no recovery under the second cause of action.

22.

I instruct you that plaintiff in his first cause of action seeks to recover compensation for injuries he received in the course of his employment in defendant's mine, at Ellamar, Alaska, on the 12th day of January, 1916; and in his second cause of action he seeks to recover damages for the aggravation of said injuries and for mental and physical suffering alleged to have been undergone by reason of defendant's neglect to furnish him timely and sufficient surgical care and medical and hospital care; therefore, I further instruct you that before you can find for the plaintiff on his second cause of action you must be able to determine that his original injury has been aggravated, thereby causing additional physical and mental suffering or physical disability,

or both, and that the same is of such a definite and appreciable nature that you are warranted in assessing money damages against the defendant to cover the same. Any such physical and mental suffering and physical disability must be separate and apart from the mental and physical suffering and physical disability the plaintiff sustained as the normal result of the original injury.

23.

I instruct you that even if the defendant failed to furnish [276] the plaintiff with timely and sufficient surgical care and medical and hospital services that it was the duty of the plaintiff to seek surgical aid and medical care from others, with a view of reducing his alleged claim for damages; and if you find from the evidence that the plaintiff had an opportunity to but failed to do so, then I instruct you that the plaintiff cannot recover damages for permanent disability, physical and mental suffering, caused by his neglect, if you find there was any neglect on his part to use reasonable means at his command to relieve his alleged impaired physical condition, or to avail himself of an opportunity so to do at the expense of the defendant, if you find such an opportunity was so extended by defendant.

24.

You are instructed that the plaintiff in his second cause of action is not entitled to recover from the defendant anything on account of the pain, suffering and disability caused by the original injury, but only for such additional pain, suffering and injury

as is produced by the negligence or want of skill of the employees and agents of the defendant, in the treatment of plaintiff, under the direction of defendant.

25.

I instruct you that under the hospital arrangement between the defendant and its employees, as set out in the pleadings and as testified to by the various witnesses, the defendant company was not bound to maintain a physician and [277] surgeon at its mine at Ellamar, and its mere failure to have a physician and surgeon at its mine, at the time of the accident in which the plaintiff received his injuries, is not such negligence on the part of the defendant as would enable the plaintiff to recover any damages in this second cause of action.

26.

In making up your verdict you should not take into consideration any evidence sought to be introduced but stricken by the Court, neither should you permit the remarks or expressions of counsel to influence you in arriving at a verdict unless such remarks or expressions are based upon the evidence in the case or are reasonably inferred therefrom.

27.

Herewith I hand you the instructions I have just read to you, together with such of the pleadings as are properly submitted for your inspection; also the exhibits and forms of verdict, to assist you in the preparation of the same. I also submit special findings which you will make and return with your verdict. [278]

Exceptions of Plaintiff to Instructions of Court to Jury.

Mr. RITCHIE.—If the Court please, before the jury retires, the plaintiff at this time desires to except to the instruction of the Court providing that the jury shall make special findings number 6 and 7, on the ground these instructions and those findings impose upon the plaintiff a legal liability to which he is not subject, and interpose in behalf of the defendant a legal defense, to which it is not entitled. Plaintiff also excepts to the last paragraph of instruction No. 11 upon the ground just stated, that it imposes upon the plaintiff a legal liability which is not imposed upon him by the law, and interposes in behalf of the defendant a defense to which it is not entitled.

Plaintiff further excepts to the whole of instruction No. 23 upon the ground that it confuses the liability, if any, imposed in this case upon the plaintiff for contributory negligence; any liability for contributory negligence to which he might be subject has been stricken from the common law and repealed by chapter 45 of the Session Laws of 1913, which provides in the second section for the apportionment of liability in case of contributory negligence on the part of the plaintiff and we except further to the last two lines, beginning in the third line from the bottom, following the word "condition," the part reading as follow:

"Or to avail himself of an opportunity so to

do at the expense of the defendant, if you find such an opportunity was so extended by defendant.”

Upon the ground that there was no legal liability under any circumstances.

We except to the last two lines and a half referring to the opportunity claimed to have been extended by defendant to plaintiff upon the ground that at that time it had absolutely forfeited [279] any right under his previous existing contract to claim his attendance at Ellamar at all. They still had a right to make a physical examination of him where they could find him, but they could not, under any circumstances, require him to be recalled at Ellamar, because having been guilty of a breach of the contract themselves, they could no longer claim anything under the contract.

By the COURT.—The exceptions will be allowed.

Mr. DONOHOE.—The defendant at this time excepts to instruction No. 11 as given by the Court which states that the defendant denied the existence of the injuries of plaintiff, etc., and refused further surgical and medical care, etc., on the ground that it is assuming a fact not testified to in the case, there being no testimony whatever introduced that the defendant ever denied the existence of plaintiff's injury or ever denied or refused him further surgical care and aid, and on the ground that such instruction does not state the law governing plaintiff's first or second cause of action, and on the further ground that instruction No. 11 seems to apply to plaintiff's first cause of action and covers ground entirely for-

eign to this cause of action, and has no reference whatever to plaintiff's first cause of action.

Defendant excepts to instruction No. 14 on the ground that the same does not correctly state the allegations of plaintiff's complaint as set forth in the second cause of action and does not correctly state the testimony offered in behalf of plaintiff in support of his second cause of action and therefore has a tendency to bias and prejudice the jury against the substantial rights of the defendant.

Defendant excepts to instructions No. 16 on the ground that the [280] same does not state the law correctly concerning the hospital contract between plaintiff and defendant as shown by the pleadings and the evidence, and seems to convey to the jury that the defendant, under the terms of said contract, was obliged to maintain at its mine at Ellamar, Alaska, a competent physician to pass upon the injuries to the plaintiff at the time they occurred; all of which is prejudicial to the substantial rights of the defendant and not the law governing the case.

Defendant excepts to instruction No. 17 on the ground that the same does not state the law governing the case, and the same is prejudicial to the substantial rights of the defendant, because it does not state the evidence and allegations of the pleadings correctly, in that it uses the phrase "mental torture," which does not appear in the pleadings and was not used in any of the evidence; likewise uses the word "malpractice," which does not appear in the evidence or pleadings. Further, it authorizes the jury to find under the second cause of action for the

same matters or things covered by the first cause of action.

Defendant excepts to instruction No. 18 on the ground that the same does not state the law governing plaintiff's second cause of action, in that it instructs the jury that they may find for plaintiff on the second cause of action for the same matters and things alleged in the first cause of action for which he would be fully compensated if the jury find in his favor in the first cause of action, and further, any verdict found by the jury in favor of the plaintiff on the second cause of action would be entirely speculative and not based upon any evidence offered at the trial. [281]

Defendant excepts to the refusal of the Court to give instruction No. 5 offered and requested by the defendant to be given to the jury as the law governing plaintiff's first cause of action in its entirety; and further excepts on the ground that said instruction is not wholly covered by other instructions of the Court. The requested instruction is as follows:

"I instruct you that under the Compensation Act, under which plaintiff's first cause of action is brought, an injured employee during the continuance of his disability, if requested by his employer, must submit himself to an examination by a physician or surgeon authorized to practice medicine under the the laws of the Territory of Alaska, furnished and paid for by the employer. If any employee refuse to submit himself to such examination his right to compensation shall be suspended during such

period of such refusal; and I further instruct you that the defendant company had a lawful right to request said plaintiff to submit to said examination at Ellamar, Alaska, and if you find from the testimony that the defendant company did request the plaintiff to submit to such an examination and the plaintiff did not do so, then I instruct you that from the time of said request until the plaintiff did submit to such an examination, he is not entitled to compensation, and you should consider this instruction in considering your answer to question number 2 herewith submitted."

Defendant excepts to the refusal of the Court to give defendant's instruction No. 3 offered and requested to be given to the jury in its entirety, in regard to plaintiff's second cause of action, on the ground that the same is not covered by other instructions, in that none of the other instructions contain that part of requested instruction number 3, which provides that it was the duty of the plaintiff to make known to the defendant that he wanted further medical and surgical aid and unless he did make such demand of the defendant, the defendant was not liable. The requested instruction is as follows:

"I instruct you that under the hospital contract alleged in the pleadings, the defendant was not bound [282] to furnish plaintiff the services of a specialist in surgery, and if the plaintiff was dissatisfied with the treatment he received in the defendant's temporary hospital at Ellamar, or was dissatisfied with the opinion

given by Doctor Duckwall as to the condition of his right clavicle on or about the tenth day of February, 1916, then it was the plaintiff's duty to make his dissatisfaction known to the defendant and demand further medical or surgical aid; and unless you find by a preponderance of the evidence that the plaintiff did demand of the defendant, or its officers, further medical or surgical aid and the defendant refused to give it, then you must find for the defendant and against the plaintiff."

Defendant excepts to the refusal of the Court to give instruction number 4 in regard to plaintiff's second cause of action offered and requested by the defendant to be given by the Court to the jury as the law governing plaintiff's second cause of action, as follows:

"I instruct you that the plaintiff, in his second cause of action, cannot recover against the defendant on account of insufficient surgical care and medical and hospital services, which may have aggravated his original injury, for the reason that he has been fully compensated for such injuries in his first cause of action; therefore, you cannot find in favor of the plaintiff and against the defendant in any sum whatever on this account."

Defendant excepts to the refusal of the Court to give instruction number 5 in regard to plaintiff's second cause of action, offered and requested to be given to the jury by the Court as the law of the case, as follows:

“I instruct you that even if the defendant failed to furnish the plaintiff with timely and sufficient surgical care and medical and hospital services, that it was the duty of the plaintiff too seek surgical aid and medical care from others, with a view of reducing his alleged claim for damages; and if you find from the evidence that the plaintiff had an opportunity to, but failed to do so, then I instruct you that the plaintiff cannot recover any sum whatever against the defendant on account of his alleged permanent disability and his physical and mental suffering subsequent to the date that he had an opportunity to secure such other surgical and medical care.” [283]

Defendant excepts to the refusal of the Court to give instruction number 6 in regard to plaintiff's second cause of action, as offered and requested to be given by the Court to the jury as the law of the case, for the reason that the same is not covered by other instructions given by the Court, in that they do not contain that portion of requested instruction number 6 to the effect that the jury must be able to determine with reasonable certainty the amount that plaintiff's original injury has been aggravated and the amount of physical and mental suffering plaintiff has undergone by reason of the alleged neglect on the part of the defendant as separate and apart from the natural results of the original injury. The requested instruction is as follows:

“I instruct you that plaintiff in his first cause of action seeks to recover compensation for in-

juries he received in the course of his employment in defendant's mine at Ellamar, Alaska, on the 12th day of January, 1916; and in his second cause of action he seeks to recover damages for the aggravation of said injuries and for mental and physical suffering alleged to have been undergone by reason of defendant's neglect to furnish him timely and sufficient surgical care and medical and hospital care; therefore, I further instruct you before you can find for the plaintiff on his second cause of action, you must be able to determine, with reasonable certainty, the amount his original injury has been aggravated and the amount of physical and mental suffering he underwent by reason of the said neglect on the part of said defendant, as separate and apart from the mental and physical suffering he underwent as the natural result of the original injury, and unless you can find this by a preponderance of evidence, you must find for the defendant and against the plaintiff on plaintiff's second cause of action."

Defendant excepts to the refusal of the Court to give defendant's requested instruction number 7, as offered and requested by the defendant to be given as the law of the case in regard to plaintiff's second cause of action, as follows: [284]

"I instruct you that from the evidence offered it is impossible to determine with any degree of certainty the amount of physical and mental suffering the plaintiff has undergone by reason of the alleged neglect and refusal of defendant

to furnish plaintiff with sufficient surgical care and medical and hospital services, from the physical and mental suffering which would be the natural result of the original injury, therefore any verdict which you might return for plaintiff on his second cause of action would be purely speculative and this the law does not allow; I therefore instruct you that you must find for the defendant and against the plaintiff on plaintiff's second cause of action."

Defendant excepts to the ruling of the Court in refusing to give defendant's instruction number 9, offered and requested by defendant to be given to the jury as the law regarding plaintiff's second cause of action, as follows:

"I instruct you that if you believe from the evidence that Doctor Duckwall was a physician and surgeon authorized to practice medicine under the laws of the Territory of Alaska, at the time he made the examination of the plaintiff on the 10th day of February, 1916, and after making said examination, he notified the plaintiff and the defendant that the plaintiff had entirely recovered from his injury, and the plaintiff then and there made no protest to the opinion expressed by Doctor Duckwall; then I instruct you that the defendant was justified in relying upon the opinion so expressed by Doctor Duckwall, and if the plaintiff, after consulting other physicians, was advised that he was still suffering from said injuries, it was plaintiff's duty to immediately notify said defendant of this fact and to demand

of defendant such further surgical care and hospital and medical treatment as he might need, before he could hold the defendant liable for failure on its part to perform its part of the hospital contract; and unless you find from the evidence that the plaintiff did make such a demand on the defendant and the defendant refused to comply with such demand, then you must find for the defendant and against the plaintiff.

If you further believe from the evidence that as soon as the defendant company learned that the plaintiff claimed to be suffering from said injury, after he had left Ellamar, the defendant company in good faith immediately offered to give him surgical care and medical and hospital services and that the plaintiff refused to accept the same, then I instruct you that the defendant company did all that was required of it under its hospital contract with plaintiff, and you must find for the defendant and against the plaintiff." [285]

The COURT.—With reference to the exception taken by the defendant to instruction number 17 and so much thereof as referred to the phrase "mental torture"—the instruction is modified and the jury are so instructed—that the word "torture" is stricken out of the instruction and the word "suffering" is substituted, so that the instruction will now read:

"The parties being brought into this relation above described, the plaintiff may maintain an action for the breach of the implied obligation

caused by unskilful, negligent or improper treatment on the part of the defendant, which action is known in law as a tort, and if the plaintiff proves the allegations of his second cause of action by a fair preponderance of the evidence, he is entitled to recover damages caused by the unnecessary physical pain, mental suffering and physical disability suffered by him through defendant's negligence or malpractice."

As to all the other exceptions presented on the part of defendant, they are allowed. The bailiffs may come forward and be sworn.

(Bailiffs sworn.)

The COURT.—Mr. Donohoe, I do not think the form of verdict you have handed me covers the situation. This is the form that I think should be submitted. (Handing to counsel.)

Mr. DONOHOE.—Is that the verdict you propose to hand to the jury?

The COURT.—That is one of the forms.

Mr. DONOHOE.—I want to make some exceptions to that.

The COURT.—If you desire to take an exception to the Court's submitting a form of verdict, I do not know that it is subject to an exception. Forms of verdict are submitted to a jury for the purpose of enabling them to arrive at a correct expression of what may be their verdict. * *

Mr. DONOHOE.—My theory of the case has been all the way through that there would have to be two verdicts—the first would consist [286] of special findings and on the second cause of action an ordi-

nary verdict. I think I have a perfect right to ask an exception to whatever verdict the Court submits to the jury.

The COURT.—The Court is not submitting a verdict to the jury; the Court is submitting a form of verdict which they may use if they choose in making up their verdict; it is not directory to the jury—they will not use it unless they so desire, but if they so desire, they may use it in making up their verdict.

Mr. DONOHOE.—At this time the defendant requests the Court to submit to the jury as a form of verdict in regard to the second cause of action, the verdict submitted to the Court by the defendant, as follows:

“We, the Jury, sworn and empanelled to try the above-entitled cause, find for the defendant and against the plaintiff on plaintiff’s second cause of action set forth in his third amended complaint.”

The COURT.—Which the Court refuses to do, for the reason that if it were used by the jury, it would not be a verdict in the case. It may be filed, however, and an exception will be allowed.

Mr. DONOHOE.—Now, the defendant excepts to the verdict submitted by the Court, which includes a money judgment on the first cause of action, provides for a money judgment on the first cause of action, upon the ground that all the jury can find in the first cause of action is special findings, upon which the Court makes up its judgment.

The COURT.—As the Court has already stated,

the Court is not submitting any verdict to the jury, and that portion of your exception is absolutely incorrect. I am not submitting any verdict to the jury—the Court is submitting a form of verdict which the jury may use if they so desire, in assisting them to make up their verdict. The Court has no authority to submit a verdict to the jury and I am not submitting a verdict to the jury—the [287] jury finds the verdict.

Mr. DONOHOE.—Instead of a verdict I will say, form of verdict.

The COURT.—Very well—the exception will be allowed. The jury may now retire in the custody of the bailiffs.

Sunday, January 7, 1917, 1 P. M.

(The jury returns into court with their verdict and special findings which are read by the clerk.)

Exceptions of Defendants to Form of Verdict.

Mr. DONOHOE.—Before the jury is discharged, at this time the defendant excepts to the form of verdict, in that, under the first cause of action the jury are not warranted in finding any specific sum as plaintiff's damages. They should find, under special findings, the percentage of his loss of earning power and the Court would fix, from their special findings, the amount of compensation; and we except to the verdict, that relating to the second cause of action, on the ground that the same is not warranted by the evidence. We also except to the special finding which estimates the plaintiff's damage at a higher percentage than that pleaded in the complaint, the third amended complaint, the third amended com-

plaint pleading that the plaintiff had been permanently injured thirty-three and one-third per cent and the jury finding the degree of permanent injury to be thirty-eight per cent.

The COURT.—The exceptions will be allowed. The matter of the 33 $\frac{1}{3}$ % and the 38% appears to the Court to be a legal proposition which will have to be taken up later. [288]

Certificate of Stenographer to Proceedings, etc.

I do hereby certify that I am the official court stenographer for the Third Judicial Division of Alaska: That as such I reported the proceedings had and testimony presented at the trial of the above-entitled cause, to wit: Tony Possus vs. Ellamar Mining Company, a Corporation. That the above is a full, true and correct transcript of the testimony introduced and proceedings had at said trial.

Dated Valdez, Alaska, February 10, 1917.

I. HAMBURGER.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 19, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [289]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Special Findings.

The jury are instructed to make answer to the seven questions herewith submitted, the same to be and constitute their Special Findings in the first cause of action, and sign each by their foreman.

First. Had the plaintiff a mother dependent upon him at the time of his injury?
No.

C. H. KRAEMER,
Foreman.

Second. Did such injury, as such, cause a permanent partial disability? Yes.

C. H. KRAEMER,
Foreman.

Third. If it did cause a permanent partial disability, by what per cent did it reduce plaintiff's earning capacity? 38%.

C. H. KRAEMER,
Foreman.

Fourth. Did such injury as such cause a temporary disability? No.

C. H. KRAEMER,

Foreman.

Fifth. If it did cause a temporary disability, what was the period of time, expressed in days, of such temporary disability? None.

C. H. KRAEMER,

Foreman.

Sixth. Did the plaintiff during his period of temporary disability, if you find by a fair preponderance of the evidence that he has suffered a temporary disability, refuse to submit himself to an examination by a physician or surgeon or in any way obstruct any such examination, under the provisions of Section 24, hereinbefore set forth? No.

C. H. KRAEMER,

Foreman.

Seventh. If you find that the plaintiff, during a period of temporary disability caused by said injury as such, did refuse to submit himself to an examination by a physician or surgeon, or did obstruct any such examination under the provisions of said Section 24, for what period of time in days in your judgment shall the plaintiff forfeit his right to compensation, providing you find

there should be any forfeiture declared
by you? None.

C. H. KRAEMER,
Foreman.

Dated Valdez, Alaska, January 7th, 1917.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jan. 7, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. Entered Court Journal No. 11, page 101. [290]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Verdict.

We, the jury duly impaneled and sworn in the above-entitled cause, do upon our oaths find as follows:

On the first cause of action stated in plaintiff's third amended complaint we find for the plaintiff and assess his damages at \$1368.00.

On the second cause of action stated in plaintiff's third amended complaint we find for the plaintiff and assess his damages at one dollar.

C. H. KRAEMER,
Foreman.

Dated Valdez, Alaska, January 7, 1917.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jan. 7, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. Entered Court Journal No. 11, page 101. [291]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONNY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

**Motion for Judgment in Favor of Defendant,
Notwithstanding the Verdict.**

Comes now the above-named defendant and moves this Honorable Court to enter judgment in favor of defendant and against the plaintiff, notwithstanding the verdict and special findings of the jury, found and returned in court on the 7th day of January, 1917, in the following particulars:

First. That in regard to plaintiff's first cause of action the Court enters judgment against the plaintiff and in favor of the defendant, adjudging, that the plaintiff did not sustain a permanent partial disability by reason of the injuries he received, set forth and described in the pleadings, for the following reasons:

- (a) That the facts stated, in the first cause of action of plaintiff's third amended complaint do not constitute the cause of action, against the defendant, entitling plaintiff to a judgment that he has sustained a permanent partial disability to any degree whatever.
- (b) That the testimony offered at the trial of said action on behalf of plaintiff is not sufficient to sustain a verdict that the plaintiff had sustained a permanent partial disability to any degree whatever.

Second. That in regard to plaintiff's second cause of action that the Court enter judgment against the plaintiff and in favor of the defendant, on the ground that the facts stated, in plaintiff's second cause of action, set forth in his third amended complaint are not sufficient to constitute a cause of action in favor of the plaintiff and against the defendant.

DONOHUE & DIMOND,
Attorneys for Defendant.

I hereby accept service of the above by receiving a copy thereof this 9th day of January, 1917.

LYONS & RITCHIE,
Attorneys for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jan. 9, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.
[292]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

**Minute Order Denying Motion for Judgment in
Favor of Defendant Notwithstanding the Verdict.**

Now on this day this motion came on to be heard, Lyons & Ritchie appearing as attorneys for plaintiff and Donohoe & Dimond and W. S. Bonnifield appearing as attorneys for defendant, and on behalf of motion, and after argument had and the Court being fully advised in the premises,—

IT IS ORDERED that said motion be, and the same is hereby denied, to which order and ruling of the Court defendant excepts and exception is allowed.

September, 1916, Term—January 9th, 1917—85th Court Day—Tuesday.

Entered Court Journal No. 11, page No. 106.
[293]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Motion for New Trial.

Comes now the above-named defendant and moves this Honorable Court for an order setting aside the verdict and special findings, found and returned by the jury, in said cause, on the 7th day of January, 1917, and granting said defendant a new trial of said cause on the following grounds:

First. Excessive damages, on plaintiff's first cause of action, appearing to have been given by the jury under the influence of passion and prejudice, in this: The jury in their third special finding find that plaintiff's earning capacity, by reason of said injury, has been reduced permanently 38%, and in their verdict assess his compensation at \$1368; the plaintiff in his complaint does not claim that his earning capacity, by reason of said injury, has been reduced permanently more than 33 $\frac{1}{3}$ per cent. This under the findings and the law governing compensation does not entitle the plaintiff to a judgment on his first cause of action for more than \$1,200, and even

\$1,200 would be excessive as compensation for plaintiff's injury under the evidence and could not be reached or assessed by the jury from any of the evidence offered at said trial. The only evidence offered in the entire trial tending in any manner to establish the fact that the plaintiff was permanently injured was that of Dr. Boyle and this witness, under cross-examination, refused to state that plaintiff was permanently injured and did state that massage treatment and application of liniment, in the region of plaintiff's [294] right clavicle, would probably restore plaintiff's full use of his right arm and shoulder and the entire evidence establishes the fact that if plaintiff has sustained any permanent injury, whatever, by reason of the accident and a permanent disability resulting therefrom, would be very slight.

Second. Insufficiency of the evidence to justify the verdict and that said verdict is against the law for the following reasons:

(a) There is no evidence whatever introduced at the trial that would sustain the finding of the jury, that plaintiff is now suffering from permanent disability or partial permanent disability to the extent that the same would reduce his earning capacity for the remainder of his life nor does the plaintiff in any of his pleadings allege that he is permanently disabled or permanently partially disabled. The only testimony offered at the trial of this case which in any manner tends to establish that the plaintiff is permanently partially disabled was the testimony of Dr. Boyle and this testimony was uncertain and vague, and on cross-examination the witness ad-

mitted that he could not at this time form an opinion as to whether or not the plaintiff was permanently partially disabled, but did state that, in his opinion, massage treatment with applications of liniments would greatly improve plaintiff's condition; he also testified to making an examination of plaintiff, in July, 1916, and recommended such treatment to plaintiff and plaintiff did not ask him to treat him; the witness also testified that in his experience as a physician and surgeon he had treated many patients for broken clavicles but had never seen a case that caused permanent partial disability; Drs. Gross and Newlove, witnesses for the defendant, testified that from a careful examination of the plaintiff they were quite positive that the plaintiff at this time was not suffering from any disability [295] whatever by reason of the injuries received in the accident. Plaintiff not only failed to establish by a preponderance of evidence that he is permanently partially disabled but failed to establish the fact, by any direct or certain evidence whatever; therefore, defendant contends that there is not sufficient evidence to justify the verdict returned and rendered by the jury in favor of plaintiff on his first cause of action.

(b) Plaintiff has wholly and utterly failed to establish by any sufficient evidence, whatever, "that because of defendant's neglect and refusal to furnish him timely and sufficient surgical care and medical and hospital services his original injuries were aggravated or that he had undergone unnecessary physical and mental suffering" which he alleges as the grounds for his recovery in the second cause of

action. While the testimony of the defendant clearly establishes that the plaintiff did receive proper and timely care and treatment for his injury and that as a result of said treatment his right clavicle is now in as good a condition as it ever was for the purpose of performing its natural functions and that if his clavicle had been fractured the union affected was above the average result of a fracture.

Third. Errors in Law committed by the Court, at the trial of said action and excepted to by the defendant as follows:

(a) The Court erred in overruling defendant's objection made at the commencement of the trial to the introduction of any testimony whatever in any manner sustaining the allegations of plaintiff's second cause of action for the reasons set forth in said motion, which are the same reasons set forth in defendant's Demurrer to plaintiff's third amended complaint heretofore filed in the case and now of record.

(b) The Court erred in denying defendant's motion made at the commencement of the trial for an order requiring the [296] plaintiff to elect on which of the two causes of action, set out in his third amended complaint, he proposed to stand for a recovery and judgment, for the reason that said two causes of action are not properly joined and should be tried in two separate suits and for the further reason, that a recovery on the first cause of action would preclude a recovery on the second cause of action and further, because a recovery on each cause of action would be a double recovery on the same

cause of action and further, because it would not be possible for a jury to determine, with any degree of certainty, what amount of pain and suffering the plaintiff underwent by reason of the matters and things set out in his second cause of action as distinguished from the natural result and consequence of the original injury described in the first cause of action.

(c) The Court erred in permitting the plaintiff to introduce any testimony whatever in support of plaintiff's second cause of action, for the reasons heretofore stated and for the further reason that by permitting such evidence to be introduced it tended to bias and prejudice the substantial rights of the defendant in regard to plaintiff's first cause of action and had the direct result of causing the jury to assess the compensation for plaintiff in his first cause of action in a much larger sum than they would have otherwise done; this is especially true in permitting plaintiff to testify that Ward Estey, an officer of defendant company, had called plaintiff a Bohunk son-of-a-bitch and told him to get out.

(d) The Court erred in denying defendant's motion at the close of plaintiff's case, to instruct the jury to return a verdict on plaintiff's second cause of action in favor of defendant and against the plaintiff, for the reasons set out in said motion, which reasons are contained in the record of the trial.
[297]

(e) The Court erred in denying defendant's motion made at the close of plaintiff's case for a nonsuit of plaintiff's second cause of action, for the

reason set forth in said motion which is now contained in the records of the trial of said action.

(f) The Court erred in sustaining plaintiff's objection to a series of questions asked Dr. Newlove, while on the stand as a witness for defendant, concerning a fractured clavicle of witness "Ells" and in sustaining plaintiff's objection to certain questions asked witness "Ells," a witness for defendant, concerning the physical result which he experienced from a fractured clavicle he had sustained, and in denying defendant the right to demonstrate to the jury by witness "Ells" that the use of his right arm and right shoulder was not impaired by reason of his right clavicle being fractured at the same point at which the plaintiff claimed his clavicle was fractured and to demonstrate to the jury that the right clavicle of witness "Ells" had been fractured and that in the union of the bone the ends at the fracture had overlapped more than one-half an inch. The reason that this testimony was relevant and pertinent is that the Court had permitted Dr. Boyle, while a witness for the plaintiff, to produce the plaintiff, remove the clothing from the upper portion of his body and shoulder and exhibit to the jury plaintiff's right clavicle and to explain to the jury that in the union of the bone there had been an overlapping of about a half-inch; Dr. Boyle having further testified that the only reason that he could assign as to why the plaintiff had not the full normal use of his right arm and shoulder was because in the union of the fractured clavicle there had been a slight overlapping of the clavicle.

(g) The Court erred in overruling the several other objections made by defendant to the introduction of testimony offered by plaintiff and in sustaining the several other objections made by plaintiff to the introduction of evidence offered [298] by the defendant, all of which more fully appears from the transcript of the proceedings of the trial.

(h) The Court erred in giving instruction No. II to the jury as the law governing any part of plaintiff's cause of action for the reason that said instruction does not correctly state the law in that the defendant had a legal right, under the facts testified to in the evidence, to require plaintiff to go to Ellamar for the purpose of an examination of his alleged injuries and for the further reason that said instruction assumes certain facts which have not been testified to and which there is no evidence to support, as follows:

“You are instructed that if the defendant in this case denied the existence of injuries or disability suffered by plaintiff while in its employ and refused him further surgical or medical care * * * the defendant could not thereafter require him to return for any purpose. This would be equally true if he left defendant's premises on defendant's order * * * and refused him further surgical and medical care * * * .”

And this erroneous assumption of the evidence would naturally tend to bias and prejudice the jury against the substantial rights of the defendant and the Court further erred in giving said instruction

No. II because it seems to apply to plaintiff's first cause of action but it covers ground entirely foreign to the first cause of action and has no bearing or relation thereto.

(i) The Court erred in giving instruction No. 14 to the jury because said instruction does not correctly state the allegations of plaintiff's pleading in regard to the arrangement between plaintiff and defendant as to the hospital contract. In plaintiff's reply he admits that during the time he was working for defendant he did not know what rights he had under the hospital arrangement other than that the defendant company maintained a temporary hospital at Ellamar to treat employees slightly injured and that defendant maintained a woman nurse at said temporary hospital, while in said instruction the Court assumes [299] that the hospital arrangement required the defendant to furnish the plaintiff with competent surgical and medical attendance at Ellamar; said instruction also contains certain phrases that do not appear either in the pleadings or the testimony in that it is assumed that plaintiff claims "that on account of the gross and wilful negligence of the defendant" the plaintiff suffered great pain and mental torture and still suffers some pain other than what was the natural result of his injury, neither the phrase mental torture or gross and wilful negligence appear either in the pleadings or the testimony; this all had a probable tendency to bias and prejudice the jury against the substantial rights of the defendant and may have caused the jury to assess the compensation against

defendant in plaintiff's second cause of action in a sum much larger than it would have otherwise done.

(j) The Court erred in giving instruction No. 16 to the jury on the ground that the same does not correctly state the law governing the hospital contract between plaintiff and defendant as shown by the pleadings and the evidence and seems to convey the idea to the jury that the defendant under the terms of said contract was obliged to maintain at its mine at Ellamar a competent physician to pass upon the injuries of plaintiff at the time said injuries occurred and there is no testimony whatever, to bear out this assumption and this is not even claimed by the plaintiff, all of which is prejudicial to the substantial rights of the defendant and is not the law governing the case and probably created bias and prejudice against the defendant in the minds of the jury.

(k) The Court erred in giving Instruction No. 17 to the jury on the ground that the same does not correctly state the law governing the case in that the plaintiff had no lawful right to recover any sum whatever against the defendant by reason of the matters and things stated in the second cause of action for the reason it is not alleged in plaintiff's pleading or claimed [300] by the evidence that he was unskilfully treated by the defendant but it is alleged that he was not treated at all, it thereupon became plaintiff's duty to seek such treatment as he deemed proper and then by proper action he could compel defendant to pay the expenses thereof and further, said instruction did not correctly state the

law for the reason that the plaintiff would be fully compensated for all injuries he now sustains, of which the original injury was the proximate cause, in his said first cause of action and further from the testimony it would be impossible for the jury to ascertain with any degree of certainty the amount or degree of pain and suffering the plaintiff may have undergone as the natural results of his original injury as distinguished from the amount or degree he may have experienced by reason of defendant's alleged failure to give him surgical treatment. The Court further erred in giving said instruction in using the phrases "mental torture" and "malpractice" neither of which appear either in the pleadings or testimony and which tend to bias and prejudice the jury against the substantial rights of the defendant and naturally cause the jury to assess the compensation allowed plaintiff for his first cause of action at a much higher figure than they would otherwise have done.

(1) The Court erred in giving instruction No. 18 on the ground that said instruction does not correctly state the law governing this case in that it instructs the jury that they may find for the plaintiff on his second cause of action for the same matters and things alleged in his first cause of action for which he would be fully compensated should the jury find in his favor on the first cause of action and to permit the jury to find in accordance with this instruction would permit plaintiff

the defendant to recover twice on one cause of action; said instruction is further not the law governing the

case because there was no evidence offered at the trial from which the jury could [301] ascertain with any degree of certainty the amount of damages plaintiff should recover on one cause of action and the amount that he should recover on the other cause of action and under the evidence any damages found by the jury pursuant to said Instruction, on plaintiff's second cause of action would be purely speculative and the instruction was prejudicial to the rights of the defendant also in so far as the first cause of action was concerned. This is clearly seen from the verdict of the jury in which they found for plaintiff on his second cause of action and assessed his damages at one dollar and they found for the plaintiff in his first cause of action and assessed his compensation at a figure much higher than plaintiff claimed in his pleadings, clearly showing that in assessing the compensation in the first cause of action they took into consideration the matters and things, testimony and instructions concerning the second cause of action.

(m) The Court erred in refusing to give defendant's instruction No. 6 in regard to plaintiff's second cause of action requested by the defendant to be given to the jury for the reason that the same is not covered by other instructions given by the Court, in that the other instructions do not contain that part of said instruction No. 6 informing the jury that "it must be able to determine with reasonable certainty the amount that plaintiffs original injury has been aggravated and the amount of physical and mental suffering plaintiff underwent by reason of the alleged neg-

lect on the part of the defendant separate and apart from the natural results of his original injury.”

(n) The Court erred in refusing to give defendant’s instruction No. 7 in regard to plaintiff’s second cause of action requested by the defendant to be given to the jury.

(o) The Court erred in refusing to give defendant’s instruction No. 9 in regard to plaintiff’s second cause of action [302] requested by the defendant to be given to the jury.

(p) The Court erred in refusing to give defendant’s instruction No. 3 in regard to plaintiff’s second cause of action on the ground that the same is not covered by other instructions given, in that, none of the other instructions contain that part of instruction No. 3, which provides that it was the duty of the plaintiff to make known to the defendant that he wanted and he needed further medical and surgical aid and unless he did make such demand of the defendant that the defendant was not liable.

(q) The Court erred in refusing to give defendant’s instruction No. 4 in regard to plaintiff’s second cause of action requested by the defendant to be given to the jury.

(r) The Court erred in refusing to give defendant’s instruction No. 5 in regard to plaintiffs second cause of action requested by the defendant to be given to the jury.

Dated at Valdez, Alaska this 9th day of January, 1917.

DONOHOE & DIMOND,
Attorneys for Defendant.

I hereby acknowledge service of the foregoing Motion for New Trial, by receiving a copy thereof, this 9th day of January, 1917.

LYONS & RITCHIE,
Attorneys for Plaintiff.

[Endorsed]: Filed in the District Court Territory of Alaska, Third Division. Jan. 9, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [303]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Minute Order Denying Motion for New Trial.

Now, on this day, this motion came on to be heard, Lyons & Ritchie appearing as attorneys for plaintiff, and Donohoe & Dimond and W. S. Bonnifield appearing as attorneys for defendant, and on behalf of motion, and after argument had, and the Court being fully advised in the premises,—

IT IS ORDERED that said motion be, and the same is hereby denied, to which order of the Court defendant excepts and exception is allowed.

September 1916 Term—January 9th, 1917—85th Court Day—Tuesday.

Entered Court Journal No. 11, page No. 106. [304]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Remittitur of Part of Verdict.

Now comes the plaintiff by his attorneys, Lyons & Ritchie, and by leave of Court does hereby remit from the verdict of the jury heretofore returned into court in this action finding for the plaintiff on his first cause of action in the sum of thirteen hundred and sixty-eight dollars (\$1368), the sum of one hundred and sixty-eight dollars (\$168), and consents that judgment may be entered upon said first cause of action in the sum of twelve hundred dollars (\$1200).

LYONS and RITCHIE,
Attorneys for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jan. 9, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [305]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Judgment.

This cause came on for trial at the September, 1916, term of the above-named court, at Valdez, Alaska, on the 4th day of January, 1917: The plaintiff appearing in person and by his attorneys, Messrs. Lyons & Ritchie, and the defendant appearing by its attorneys, Messrs. Donohoe & Dimond and W. S. Bonni-field, Esq.

A jury of twelve persons was duly empaneled and sworn to try the cause. The plaintiff introduced his evidence and rested. The defendant introduced its evidence and rested, and after argument by counsel, the Court, on the 6th day of January, 1917, gave its instructions, in writing, to the jury and thereafter, on the same day, the jury retired to consider of their verdict; and thereafter, on the 7th day of January, 1917, the jury returned into court with their verdict, whereby they found for the plaintiff on his first cause of action in the sum of \$1368 and on his second cause of action in the sum of one dollar. And the jury fur-

ther made special findings submitted to them by the Court, finding among other things under the first cause of action that the percentage of plaintiff's disability resulting from the original accident, which was the basis of said first cause of action, was 38%.

Thereafter, on the 9th day of January, 1917, defendant filed and submitted to the Court its motion for judgment in favor of the defendant and against the plaintiff, notwithstanding the verdict of the jury, which motion was by the Court, on the same day, denied.

Defendant thereafter, and on the same day, filed and submitted [306] to the Court its motion for a new trial, which motion was, on the same day, by the Court, denied.

Thereafter, on the same day, by leave of the Court, plaintiff filed his remittitur in the cause, moving for the reduction of said verdict from the sum of \$1368 to \$1200 and consenting to the entry of judgment in the said sum of \$1200 on said first cause of action, and the Court thereupon ordered that judgment be entered for plaintiff in the sum of \$1200 on his first cause of action.

To all of the foregoing orders so made by the Court, defendant, by its attorneys, then and there excepted and the exceptions were by the Court allowed.

WHEREFORE, By virtue of the law and of the premises aforesaid, It is ORDERED AND ADJUDGED that the plaintiff, Tony Possus, do have and recover from the defendant, The Ellamar Mining Company of Alaska, the sum of \$1200 on his first cause of action, the sum of one dollar on his second

cause of action and the costs of the action, taxed at \$——.

Done in open court, at Valdez, Alaska, this 9th day of January, 1917.

CHARLES E. BUNNELL,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jan. 9, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 11, page No. 107. [307]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

**Minute Order Granting Until February 15th, 1917,
to Prepare, File, and Settle Bill of Exceptions,
and Fixing Amount of Supersedeas Bond, and
Staying Execution Until Said Date.**

Now on this day, on motion of Donohoe & Dimond and W. S. Bonnifield, attorneys for defendant, Lyons & Ritchie, attorneys for plaintiff, consenting thereto,—

IT IS ORDERED that defendant have until February 15th, 1917, to prepare, file, and settle bill of ex-

ceptions in this cause, and that the supersedeas bond be fixed at the sum of \$2000, and the stay of execution is hereby granted until February 15th, 1917.

September 1916 Term—January 9th, 1917—85th Court Day—Tuesday.

Entered Court Journal No. 11, page No. 107. [308]

*In the District Court of the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

**Order Enlarging Time to and Including March 10,
1917, to Prepare, etc., Bill of Exceptions.**

This matter having come on for hearing before the Court on defendant's motion for an order enlarging the time within which the defendant may prepare, serve and settle its Bill of Exceptions herein upon the appeal of said cause to the Circuit Court of Appeals for the Ninth Circuit, and the attorneys for the plaintiff, Messrs. Lyons & Ritchie being present in court and consenting thereto,—

IT IS ORDERED, that the said defendant have and is hereby granted until and including the 10th day of March, 1917, within which to prepare, file and settle its Bill of Exceptions upon such appeal.

Done at Valdez, Alaska, this 13th day of February, 1917.

By the Court:

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 13, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 11, page No. 128. [309]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Order Settling and Certifying Bill of Exceptions.

The above-named defendant having prepared and filed in the above-entitled court and cause its proposed bill of exceptions to be used on writ of error to the Circuit Court of Appeals for the Ninth Circuit, and having duly served the same upon the plaintiff, and the time having expired within which said plaintiff should make and file herein his objections to such bill of exceptions, and having failed to make or file herein any such objections, and it appearing to the Court that such bill of exceptions is in proper form

and contains a full, true and correct transcript of all of the papers and pleadings filed in said cause, and of all proceedings had and done therein and of all of the testimony given therein, and the court being fully advised in the premises,—

IT IS ORDERED: That the foregoing Bill of Exceptions, consisting of plaintiff's third amended complaint, defendant's demurrer to plaintiff's third amended complaint, minute order of Court overruling defendant's demurrer to plaintiff's third amended complaint, defendant's answer to plaintiff's third amended complaint, plaintiff's motion to strike parts of defendant's answer, order of court striking parts of said answer, defendant's amended answer to plaintiff's third amended complaint, plaintiff's reply, journal record of proceedings had at trial of cause, certified transcript of record and evidence at trial by the court reporter, verdict of the jury, special findings of the jury, motion of the defendant for a judgment in its favor [310] notwithstanding the verdict of the jury, minute order of the court denying motion of defendant for a judgment in its favor notwithstanding the verdict of the jury, defendant's motion for a new trial, minute order of court denying defendant's motion for a new trial, remittitur of part of verdict by the plaintiff, judgment, minute order of court granting defendant until the 15th day of February, 1917, in which to prepare, file and settle its bill of exceptions, order of court granting defendant until and including March 10, 1917, within which to prepare, file and settle its bill of exceptions, and this order settling and certifying the defendant's bill of exceptions, be,

and the same hereby is, allowed, approved and settled.

IT IS FURTHER ORDERED, that such bill of exceptions, consisting of the record, proceedings and evidence, aforesaid, constitute defendant's bill of exceptions on writ of error of said cause to the Circuit Court of Appeals for the Ninth Circuit.

AND IT IS FURTHER ORDERED, that this order be taken and considered, and is, a certificate of the undersigned judge of the above-named court that said bill of exceptions is and constitutes a full, true and correct transcript of all of the papers and pleadings filed in said cause and of all of the proceedings had and done therein and of all of the evidence given therein, necessary or material to a determination of the issues therein, or to a full understanding of the defendant's exceptions to the rulings and orders of the court therein, which said exceptions and everything concerning the same are in said bill of exceptions fully set forth.

Done, certified and signed in chambers, being the District Court for the Territory of Alaska, Third Division, on this 24th day of February, 1917, at the term of court in which the judgment given in said cause was rendered, and by the judge of said court before whom trial of said cause was had.

CHARLES E. BUNNELL,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 24, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 11, page No. 144.
[311]

*In the District Court for the Territory of Alaska,
Third Division.*

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Assignment of Errors.

Comes now Ellamar Mining Company of Alaska, the above-named defendant, plaintiff in error herein, being about to present a writ of error in that certain decision and judgment rendered, given and made on the 9th day of January, 1917, in the above-entitled court for the Territory of Alaska, Third Division, in this cause, in that certain action then pending in said court, wherein said plaintiff in error herein, was the defendant, and said defendant herein was plaintiff, and files the following assignment of errors, which it avers were committed by the Court in the proceedings filed and rendition of judgment in the said case against the defendant and appearing upon the record herein, to wit:

I.

The Court erred in making and entering its Minute Order of the 28th day of December, 1916, overruling the demurrer of defendant, Ellamar Mining Company, of Alaska, a corporation, to plaintiff's third amended complaint, to wit:

(a) By holding and deciding in said order that

it does not appear upon the face of the said third amended complaint that several causes of action have been improperly united.

(b) By holding and deciding in said order that there is not another cause of action pending between the plaintiff and defendant for the same cause set forth in the second cause of action.

(c) By holding and deciding in said order that said third amended complaint stated facts sufficient to constitute a cause of action in favor of plaintiff and against defendant, Ellamar Mining Company, of [312] Alaska, a corporation, in said action.

II.

The Court erred in making and entering its Order on the 30th day of December, 1916, sustaining plaintiff's motion to strike from the first paragraph of defendant's affirmative defense to plaintiff's first cause of action, the following:

“that shortly after said physician and surgeon notified said plaintiff as aforesaid, that he, the plaintiff had fully recovered from the injuries he received in said accident plaintiff voluntarily left Ellamar, Alaska, and without the defendant's knowledge and without making any demand whatever on the defendant for compensation for his said injuries; that the defendant or none of its officers, had any knowledge of the whereabouts of said plaintiff from the time he left Ellamar, as aforesaid, until on or—”

III.

The Court erred in making and entering its Order on the 30th day of December, 1916, sustaining plain-

tiff's motion to strike from the second paragraph of defendant's affirmative defense to plaintiff's first cause of action, the following:

"the defendant thereupon acting through his said physician and surgeon, offered to furnish plaintiff board and lodging free and to give him daily massage treatment of the muscles for the purpose of relieving them of the alleged soreness and to continue this treatment and such other treatment as might be necessary until plaintiff was entirely relieved of said soreness; this offer plaintiff positively refused and thereupon demanded of defendant the sum of twenty-five hundred dollars and upon the defendant refusing to pay said sum plaintiff departed from Ellamar and refused to permit said physician and surgeon to treat him in any manner whatever."

IV.

The court erred in making and entering its Order on the 30th day of December, 1916, sustaining plaintiff's motion to strike from defendant's affirmative defense to plaintiff's first cause of action all of paragraph four.

V.

The Court erred in making and entering its Order on the 30th day [313] of December, 1916, sustaining plaintiff's motion to strike from the second paragraph of defendant's affirmative defense to plaintiff's second cause of action, the following:

"in order to better care for its employees who were slightly injured and to better administer

first aid to those who might be seriously injured."

VI.

The Court erred in making and entering its Order on the 30th day of December, 1916, sustaining plaintiff's motion to strike from the second paragraph of defendant's affirmative defense to plaintiff's second cause of action, the following:

"and shortly thereafter departed from Ellamar and defendant heard nothing of plaintiff and did not know of his whereabouts for more than two months thereafter."

VII.

The Court erred in making and entering its Order on the 30th day of December, 1916, sustaining plaintiff's motion to strike from the fifth paragraph of defendant's affirmative defense to plaintiff's second cause of action, the following:

"and thereupon demanded of defendant the sum of twenty-five hundred dollars and upon the defendant refusing to pay said sum plaintiff departed from Ellamar and refused to permit said physician and surgeon to treat him in any manner whatever."

VIII.

The Court erred in overruling defendant's objection to any testimony whatever being received in this trial on either of the causes of action contained in Plaintiff's Third Amended Complaint upon the ground that there are two causes of action improperly united in said complaint in this:

(a) “Plaintiff’s first cause of action, as set forth in his third amended complaint, is an action *ex delicto* and plaintiff’s second cause of action is an action *ex contractu*.”

(b) “Plaintiff’s first cause of action, as set forth in his third amended complaint, is a special statutory proceeding and plaintiff’s second cause of action is a common law action.” [314]

Defendant’s said objections to the reception of any testimony, and the exceptions allowed by the Court upon overruling the said objections, are set forth in pages 46 to 50 of this Record and are in words, as follows:

“Mr. DONOHOE.—At this time the defendant desires to interpose an objection to any testimony whatever being received in this trial on either of the causes of action contained in Plaintiff’s Third Amended Complaint upon the ground that there are two causes of action improperly united in said complaint in this:

I. Plaintiff’s first cause of action, as set forth in his third amended complaint, is an action *ex delicto*, having for its foundation an alleged tort of the defendant; and plaintiff’s said second cause of action is an action *ex contractu*, the foundation of which is an alleged breach of a hospital contract between plaintiff and defendant and the allegations contained in plaintiff’s said second cause of action do not bring it within the rule that would permit the plaintiff to waive his contract and sue in tort, as he nowhere alleges malfeasance on the part of the defendant

in connection with said hospital contract but does allege nonfeasance or failure on the part of defendant to perform its part of said contract.

2. Plaintiff's first cause of action as set forth in said third amended complaint is a special statutory proceeding, that is, a proceeding to recover compensation for an injured employee under the provisions of Chapter 71 of the Session Laws of the Territory of Alaska, for the year 1915, which is an act entitled 'An Act relating to the measure and recovery of compensation of injured employees in the mining industry of this Territory, and the compensation to designated beneficiaries where such injuries result in death, defining and regulating the liability of employers to their employees in connection with such industry, and repealing all acts and parts of acts in conflict with this act.'

This act provides a special measure of damages to be ascertained by special rules and procedure and cannot be joined with a common law action as pleaded in plaintiff's said second cause of action, for the reason that the measure of damages and the rules of procedure governing the trial of said second cause of action are entirely different from that of the said first cause of action.

3. Plaintiff in his first cause of action seeks to obtain compensation for his present permanent disability under the provisions of Chapter 71 of the Session Laws of the Territory of

Alaska, for the year 1915, of which the accident occurring in the defendant's mine on the 12th day of January, 1916, was the proximate cause and he cannot join with such an action his second cause of action plaintiff seeks to recover damages for a portion of his present alleged injuries, for the reason that his entire injuries growing out of said accident and of which said accident is the proximate [315] cause will be fully compensated in his first cause of action.

Further, the defendant demurs to plaintiff's second cause of action set forth in plaintiff's third amended complaint on the ground that there is another cause of action pending between the plaintiff and defendant for the same cause set forth in the said second cause of action, to wit: Plaintiff's first cause of action. In this cause of action plaintiff seeks to recover damages and compensation for an injury received by him in the course of his employment as a miner in the employ of the defendant and under the terms of said Chapter 71 of the Session Laws of Alaska, for the year 1915, he is entitled to be compensated for any defects he has sustained and now has, of which the original injury was the proximate cause and it is immaterial whether his alleged permanent injury was enhanced or aggravated by the lack of proper hospital treatment or not. The defendant in the first cause of action will be required to compensate the plaintiff for all injury he now sustains which grew out of the original injury set forth

in said first cause of action. To permit the plaintiff to maintain his second cause of action would be to compel the defendant to answer the same charge twice and compel the defendant to answer twice in damages for the same cause of action.

And further, defendant demurs to plaintiff's second cause of action contained in plaintiff's said third amended complaint on the ground that it does not state facts sufficient to constitute a cause of action in favor of plaintiff and against defendant.

These are the same grounds I had in the demurrer and in order to preserve the record, I desire to make this objection at this time as a demurrer to the entire evidence.

By the COURT.—The objection is overruled and exception allowed.

Mr. DONOHUE.—Now I move the Court for an order requiring the plaintiff to elect on which of his two causes of action he now seeks to recover, on the theory that both causes of action are for the same thing and cannot be separated.

By the COURT.—Which motion is denied and exception allowed.”

IX.

The Court erred in overruling defendant's objection to a question asked by plaintiff's counsel which said question and objection and the exception allowed by the Court upon overruling the said objection, is set forth on pages 55 to 57 of this Record and are in words, following:

“Q. How long did he suffer any pain or handicap in the use of his jaw?

Mr. DONOHOE.—We object to that question at this time on the ground that if the evidence is applied to the first cause of action it is incompetent, irrelevant and immaterial and I would like at this time to find out what would be the theory of the Court in trying this case, whether the first cause of action may be proven first and then the second or whether the evidence [316] will be intermingled in the two causes of action—I am at a loss to know how to proceed on it.

The COURT.—Of course counsel will present the questions directed toward the first cause of action first but I anticipate that some of the questions which would be presented would also apply to the second cause of action. The objection will be overruled and defendant allowed an exception.”

X.

The Court erred in overruling defendant's objection to any testimony being offered in any manner tending to prove the allegations of plaintiff's second cause of action contained in plaintiff's third amended complaint. Said objections being made on the grounds:

(a) “That the complaint so far as that action is concerned does not state facts sufficient to constitute a cause of action.

(b) That it commingles the two causes of action together in such a manner that the jury

will not be able to determine one from the other with any degree of certainty or definiteness.”

The said objections and the exception allowed by the Court are set forth on pages 56 and 57 of this record.

XI.

The Court erred in allowing testimony to be introduced over the objection of defendant which testimony and objections and the ruling of the Court in overruling said objection appear on page 57 of this record are in the words following:

“Q. What kind of a bandage?

Mr. DONOHOE.—We make the same objection.

Objection overruled; defendant allowed an exception.

Q. Did she put anything else on besides the bandage?

Mr. DONOHOE.—We object to that as leading.

Objection overruled; defendant allowed an exception.

Q. How long did she leave the bandage on you? A. It was taken off the next day.

Q. Did she put any other bandage on?

A. Just a plaster was left.

Q. How long did that remain on?

A. He says it was taken off the very next day after the second.

Q. Was there anything else placed on him then, after that?

A. He says some liquid, something in liquid form, was put on his shoulder—some medicine in liquid form.

Q. Tell him to describe that plaster—how much of his body or shoulder did that cover?

Mr. DONOHOE.—I have an objection and exception to all this line of testimony.

The COURT.—Yes, sir.”

XII.

The Court erred in allowing testimony to be introduced over the objection of defendant, which testimony and objections and the ruling of the Court appear on page 58 of this record and are in the words following:

“Q. Did anybody connected with the company, that is, any officer of the company, come to see you at [317] any time after you went into the hospital?

Mr. DONOHOE.—We object to that question on the ground that it is incompetent, irrelevant and immaterial. It has been ruled out in the pleadings, that paragraph regarding the attempts to get a release from this man, and we object to its being testified to at this time because it is not within the pleadings.

By the COURT.—He may answer; the objection will be overruled. Defendant allowed an exception to the ruling.”

XIII.

The Court erred in allowing testimony to be introduced over the objection of defendant, which testimony, objection and the ruling of the Court appear

on pages 59 and 60 of this record and are in the words following:

“Q. What did Mr. Estey say if anything?

Mr. DONOHOE.—We object to that question on the ground that it is incompetent, irrelevant and immaterial and not within the issues joined by the pleadings.

Mr. RITCHIE.—We maintain it is admissible to support the second cause of action, showing the attitude of the company toward this plaintiff from the time of the accident until the present time and is part of the *res gestae*.

By the COURT.—Mr. Interpreter, did you give the entire answer to the last question?

The INTERPRETER.—Yes, your Honor, I did.

The COURT.—That was all of his answer.

The INTERPRETER.—Yes.

By the COURT.—He may answer the question. The objection will be overruled and defendant allowed an exception.

A. When he came to see him, he brought a paper to sign to him.

Q. What did he say about that paper?

Same objection; objection overruled—defendant allowed an exception.

A. He said Mr. Estey said to him, you sign this paper—if you sign your paper you get your half pay; if you don't sign, we are going to throw you out the next day.”

XIV.

The Court erred in allowing testimony to be intro-

duced over the objection of defendant, which testimony, objection and the ruling of the Court appear on page 61 of this record and are in the following words:

“Q. Did he come there at any time afterward? [318]

Mr. DONOHOE.—We object to that question on the ground that it is incompetent, irrelevant and immaterial and on the further ground that it is shown by the plaintiff’s testimony that Mr. Gedney had no power to bind the defendant company in any manner whatever. He has already testified that Mr. Estey was in full command of the affairs there during the time of this accident.

Objection overruled; defendant allowed an exception.”

XV.

The Court erred in overruling defendant’s objection to the introduction of testimony, which testimony, objection and the ruling of the Court appear on pages 62 and 63 of this record and are in the following words:

“Q. Why did you leave the bunk-house?

Mr. DONOHOE.—We object to that as incompetent, irrelevant and immaterial and not within the issues joined by the pleadings. Objection overruled; defendant allowed an exception.”

XVI.

The Court erred in allowing plaintiff to answer a question, over the objection of defendant, which

question, objection and the ruling of the Court appear on page 64 of this record and are in the words following:

“Q. Have you given or sent anything to your mother for her support of late years?

Mr. DONOHOE.—We object to that as leading.

The COURT.—It is leading but he may answer the question.

Mr. DONOHOE.—We also object on the ground that the question is too indefinite; he says, has he given her or sent her anything within the last few years; that doesn't bring it within the scope of my understanding of the law.

Mr. RITCHIE.—I can't cover it all at once.

By the COURT.—I presume counsel will cover that by further questions. Tell him to answer yes or no, whether he has given his mother anything since he came to America for her support.

Defendant allowed an exception to the ruling.”

XVII.

The Court erred in allowing testimony to be introduced over the objection of defendant, which testimony, objection and the ruling of the Court appear on pages 65 and 66 of this record and are in the following words:

“Q. Have you suffered any pain from your injuries? [319]

Mr. DONOHOE.—We object to that question on the ground that it is incompetent, irrelevant

and immaterial. So far as the first cause of action is concerned, it doesn't matter whether he suffered pain or not; if directed to the second cause of action, the two actions are so intermingled that it would be impossible for the jury with any degree of certainty to determine what portion of this pain and suffering would apply to the one cause and what would apply to the alleged other cause. Objection overruled; defendant allowed an exception.

A. He says he pains occasionally now yet from the injury.

Q. Where does he suffer pain?

Same objection; overruled; defendant allowed an exception.

A. He says right in his shoulder is the pain and he says occasionally he has pains in his head.

Q. Has he suffered pain continuously in his shoulder or only from time to time?

Same objection; objection overruled; defendant allowed an exception to the ruling.

A. He says he doesn't have no pain when he doesn't use his arm or move his arm, but when he moves the arm then he has got a pain in his shoulder.

Q. Have you tried recently to use your arm and shoulder in any kind of work?

A. He says—no, he didn't try—it is always painful to lift his arm and his arm pains yet.

Q. Did the first few weeks after this injury did you suffer much pain or only a little?

Same objection; objection overruled; defendant allowed an exception to the ruling."

XVIII.

The Court erred in allowing testimony to be introduced over the objection of defendant, which testimony, objection and the ruling of the Court appear on pages 90 and 91 of this record and are in the following words:

"Q. Why did you leave the bunk-house and go to Jim Fielders?

Mr. DONOHOE.—We object to that as repetition.

The COURT.—He may answer. Objection overruled; defendant allowed an exception.

Q. What did he say; tell him to give the exact words Mr. Estey used if he remembers?

Mr. DONOHOE.—We object to that question on the ground that there is nothing in the pleadings complaining of this treatment by Mr. Estey.

The COURT.—He may answer. The objection will be overruled and exception allowed.

A. He said get out of here you Bohunk son-of-a-bitch—that is just what he said." [320]

XIX.

The Court erred in allowing testimony to be introduced over the objection of defendant, which testimony, objection and the ruling of the Court appear on pages 119 to 121 inclusive of this record and are in the following words:

"Q. Are you able to say and if you are able to say state, what, in your opinion is the degree

of impairment of the plaintiff's strength in the use of his shoulder and consequent impairment of his earning power by the failure to properly set this bone and have it corrected in the proper and natural way?

Mr. DONOHOE.—To which question we object as incompetent, irrelevant and immaterial in so far as it applies to the second cause of action. We have no objection to this testimony as applied to the first cause of action.

Mr. RITCHIE.—It applies wholly to the second cause of action. The second cause of action is based upon the claim that the earning power of the plaintiff has been impaired permanently.

By the COURT.—The objection will be overruled. The testimony of the witness will be received by the jury as applicable to the second cause of action. Defendant allowed an exception to the ruling.

A. In answering that question I can only give my opinion that the man in his present condition is impaired from performing his function, his vocation as a laboring man.

Q. Well is he wholly disqualified at this time; that is is he utterly unable to perform his usual work, his usual vocation?

Same objection; objection overruled; defendant allowed an exception to the ruling.

A. If his vocation is that of a miner, I would say Yes—requiring the use of both of his arms.

Q. Are you of the opinion that he will be totally disqualified to follow that vocation for

the rest of his life or will he partially recover? It is only an opinion of course nobody can say positively.

A. As I have previously stated, if the man had the benefit of a masseur, months it would probably take, there would probably be considerable improvement in the use of that right arm, possibly there might not be.

Q. Do you think he will ever entirely recover his normal strength and flexibility in the use of that shoulder?

A. I am inclined to question whether he will."

XX.

The Court erred in allowing testimony to be introduced over the objection of defendant, which testimony, objection and the ruling of the Court appear on pages 146 and 147 of this record and are in the following words: [321]

"Q. Tell what happened there?

Mr. DONOHOE.—We object to that question on the ground that it is incompetent, irrelevant and immaterial, and not within the issues joined by the pleadings. It comes back to the proposition of the part of the complaint which was stricken out on our motion in the first complaint, and goes to the question of signing a release to the company.

Objection overruled, defendant allowed an exception.

The COURT.—Who was present first and when was it? A. Mr. Estey.

Q. Anybody else?

A. After a while came Mr. Gedney—after ten or fifteen minutes came Mr. Gedney.

Q. What was said by Tony and Mr. Estey and Mr. Gedney?

A. Mr. Estey told Tony to sign papers, this paper—it says it was nobody's fault—it is Tony's fault himself. He said I never signed this paper because it is not my fault and Mr. Estey told him, If you not sign this paper, the Company charge you for board while you were in the hospital and Tony said, I can't help it—that is all.

Q. Did you at any time in the office or the store of the Company hear any conversation between Tony and either Mr. Gedney or Mr. Estey? A. No, I did not.

Q. Was that the only time you heard any conversation between Tony and Mr. Estey?

A. Yes, sir—after a while Mr. Estey he go and talk to Mr. Gedney.

Mr. DONOHUE.—We object to any testimony about Mr. Gedney because Mr. Gedney was not in charge of the mine at that time as shown by the plaintiff's own testimony.

The COURT.—The last part of that answer regarding Mr. Gedney may be stricken.

XXI.

The Court erred in denying the motion of the defendant, made at the close of the plaintiff's case, to instruct the jury to return a verdict on plaintiff's second cause of action in favor of defendant and against the plaintiff, which motion, the ruling of the

Court thereon, and defendant's exception to such ruling appear at pages 152 to 155, of the record, as follows, to wit:

"Mr. DONOHUE.—Defendant at this time moves the Court to instruct the jury to return a verdict on plaintiff's second cause of action, in favor of the defendant and against the plaintiff, for the following reasons, to wit:

First.—Plaintiff in the second paragraph of his reply to the defendant's affirmative defense to plaintiff's second cause of action admits that the only hospital treatment he knew he would receive in case he was injured, in consideration of the \$1.50 per month deducted from his wages as hospital dues, was as follows: 'He knew the defendant has a house equipped as a sort of crude hospital with a woman in charge of the same. [322] He knew nothing of any further method of caring for the injured employees and never had any conversation with any of the company's officials regarding the deduction of a dollar and a half a month from his wages for hospital dues or what it would entitle him to in case he was injured while in the defendant's employment.' "

The evidence shows conclusively that so far as he was concerned he received all the hospital care and attention to which he was entitled under his alleged hospital contract.

SECOND.—That the evidence offered by the plaintiff wholly failed to sustain plaintiff's second cause of action.

THIRD.—That the evidence offered by the plaintiff in support of his second cause of action is uncertain and indefinite and from this evidence it is impossible for the jury to determine with any degree of certainty that portion or part of the plaintiff's alleged suffering and pain is, or was due to the alleged negligence of defendant in not furnishing plaintiff with timely and sufficient surgical care and medical and hospital services, and what portion or part of plaintiff's alleged suffering and pain was due to the original injury, and any verdict found by the jury in favor of plaintiff on his second cause of action would be purely speculative, as the damage, if any, sustained by plaintiff, under his second cause of action, is entirely too remote and uncertain to be ascertained from the evidence.

FOURTH.—That the evidence offered by plaintiff in support of his second cause of action is uncertain and indefinite and from the evidence it is impossible for the jury to determine with any degree of certainty the extent, if any, to which the original injury has been aggravated by reason of the alleged negligence of the defendant in not furnishing plaintiff with timely and sufficient surgical care and medical and hospital services, and any verdict found by the jury in favor of plaintiff's second cause of action would be purely speculative, as to damages, if any, sustained by plaintiff under his alleged second cause of action is entirely too

remote and uncertain to be ascertained from the evidence. [323]

FIFTH.—That any damages sustained by plaintiff by reason of the injuries he sustained on the 12th day of January, 1916, or in any manner growing out of said injuries, will be fully compensated by the findings of the jury in plaintiff's first cause of action and to permit the plaintiff to recover any damages whatever under his second cause of action would be allowing him to recover twice for the same cause.

Whereupon the jury was excused and argument had upon the above motion. The jury having returned—

By the COURT.—The motion presented by the defendant for an instructed verdict on the second cause of action will be denied and exception allowed defendant.

Mr. DONOHOE.—At this time the defendant moves that the Court grant a nonsuit against the plaintiff on his second cause of action on the same grounds presented in defendant's motion for an instructed verdict.

By the COURT.—This motion will also be denied and exception allowed.

XXII.

The Court erred in sustaining the motion and objections made by plaintiff to the questions asked George Newlove, a witness for defendant, during his direct examination while a witness on the stand in behalf of defendant; appearing at pages 247, 248 and 249 of this record in the following words:

“Q. Since you examined the plaintiff on the third day of January have you had occasion to examine another man whose right clavicle was fractured and a union affected? A. I have.

Mr. RITCHIE.—We move to strike the answer and interpose the objection that it is irrelevant and immaterial—the doctor has already testified that there is a good deal of variance between clavicles and individuals.

Mr. DONOHOE.—We propose to follow this testimony by placing a man on the stand by whom we will demonstrate that the overlapping of his right shoulder, his right clavicle, far exceeds any overlapping claimed in this case of plaintiff and will demonstrate to this jury that he has absolutely free and complete use of his arms in any manner he sees fit to use them, and we will propose later on to place these two men, this man and plaintiff, side by side before this jury so they can see absolutely the condition of the two clavicles and the use of their respective arms.”

After argument by counsel the motion to strike the answer was by the Court granted and the objection [324] sustained. To which ruling of the Court counsel for defendant was allowed an exception.

“Q. Doctor, in this examination of the man referred to in the last question, did you discover whether or not in the union of the clavicle there was an overlapping of the two ends of the bone?

Mr. RITCHIE.—We object to this question as to all similar questions on the ground that

Doctor Newlove qualified as an expert on this, and he can testify either from his general knowledge of a great many cases or what he has learned from the books as to the results of overlapping or any other condition, but to take a particular isolated case and state that in that case something similar had not resulted in a permanent injury would be simply making all cases stand as an exception.

The objection was by the Court sustained; defendant allowed an exception to the ruling.

Q. Doctor, will you name the man whom you have examined since examining the plaintiff, who had an overlapping of his right clavicle in affecting a union after a fracture?

Mr. RITCHIE.—We object as irrelevant and immaterial.

Objection sustained; defendant allowed an exception.

XXIII.

The Court erred in sustaining the objection made by plaintiff to the questions asked Harry W. Ells, in his direct examination, while a witness on the stand in behalf of defendant, which questions, objections and ruling of the Court are in the following words:

“Q. Did you some time ago receive a fracture of your right clavicle or collar-bone?

Mr. RITCHIE.—We object to that as incompetent and irrelevant.

Objection sustained; defendant allowed an exception.

Q. How long after receiving an injury that

resulted in the fracture of the right clavicle was it before you resumed work?

Same objection.

The COURT.—The objection will be sustained. He has not testified he had a broken clavicle.

Mr. DONOHOE.—I know, but I don't know how else I can get this into the record.

The COURT.—In order that counsel may understand the Court's position, it is simply this: You have called expert witnesses to testify from their knowledge and experience. Now, it would certainly not be proper, on the theory of expert witnesses, to now call in the parties from whom they may have gained their experience. They have testified as expert witnesses.

Mr. DONOHOE.—No, I do not propose to do that. In the examination yesterday Doctor Boyle was permitted to have the plaintiff take his clothing off the upper part of his body and was permitted to demonstrate to the jury a depression in his shoulder and to demonstrate in the [325] shoulder what he called a malformation of the collar-bone or clavicle. With this witness I propose to demonstrate a greater depression and a greater malformation of the clavicle, demonstrate positively that the overlapping of the clavicle in the union was half an inch, and then demonstrate by this man that he hasn't the slightest bit of trouble using his right arm in any manner conceivable, and further propose to stand the two men up there,

side by side, so the jury could examine them and pass upon them themselves. It is a demonstration—not expert testimony—just as the plaintiff had a right to put in a photograph of the right clavicle from a book on anatomy—we certainly have the right to introduce this witness for that purpose. I am endeavoring to show to this jury the improbability that this plaintiff's arm is affected the least bit by the malformation he claims in his clavicle, by showing another man who has a similar or more extensive malformation, who has the full use of his arm.

The COURT.—The objection will be sustained and defendant allowed an exception.

Q. Did you enter the United States Army as a recruit subsequent to receiving a fracture in the right clavicle?

Mr. RITCHIE.—We object as incompetent and irrelevant.

Objection sustained; defendant allowed an exception.

Q. Have you any difficulty in using your right arm in any position you choose to use it in?

Same objection; objection sustained; defendant allowed an exception to the ruling.

Q. Have you any difficulty in extending your right arm perpendicularly over your head and shoulders?

Same objection; objection sustained; defendant allowed an exception.”

XXIV.

The Court erred in giving a part of instruction No. II as given by the Court in said cause; said part of said instruction being in words as follows:

“You are instructed that if the defendant in this case denied the existence of injuries or disability suffered by plaintiff while in its employment and refused him any further surgical or medical care, plaintiff thereupon became entitled to leave defendant’s premises and to control his own movements, and defendant could not thereafter require him to return for any purpose. This would be equally true if he left defendant’s premises on defendant’s order.”

—to the giving of which defendant excepted and the exception was allowed.

XXV.

The Court erred in giving instruction No. 14 as given by the Court in said cause; said instruction being in words and figures as follows:

“The Court will now direct your attention to the second cause of action set forth in plaintiff’s complaint. This cause of action is separate and distinct from plaintiff’s first cause of action and must so be considered by you.

In brief, plaintiff alleged that by virtue of an arrangement [326] existing between the defendant and plaintiff, the sum of \$1.50 per month was deducted from the wages of plaintiff, entitling him to care in a hospital and to competent surgical and medical attendance at the expense of defendant, in case of his injury or

illness arising in the course of his employment; that he was injured as set forth in his first cause of action; that upon admission, and during his stay there, no competent surgical and medical attendance was given him; that when discharged from defendant's hospital, his physical condition was greatly impaired beyond the normal result of his original injury and this on account of the gross and wilful negligence of the defendant to furnish him the competent surgical and medical attendance to which he was entitled as aforesaid; that because of defendant's neglect and refusal to furnish him timely and sufficient surgical care and medical and hospital service, which aggravated the result of his original injuries as aforesaid, and his permanent disability and the unnecessary physical and mental suffering he has undergone he has been damaged \$15,000; that he has suffered great physical pain and mental torture and still suffers some pain, other than what would naturally have resulted from his original injury, on account of defendant's refusal and failure to give him competent surgical and medical attendance to which he was entitled."

—to the giving of which defendant duly excepted and the exception was allowed.

XXVI.

The Court erred in giving instruction No. 16 as given by the Court in said cause; said instruction being in words and figures as follows:

"You are instructed that the arrangement

whereby defendant deducted \$1.50 per month from plaintiff's wages for hospital purposes as set forth in the pleadings herein was, if not repudiated by plaintiff, in effect a contract binding the defendant, at defendant's expense, to furnish plaintiff competent surgical and medical attendance, free of charge, for any injury or illness arising in the course of his employment with defendant, providing that in the event of no specific agreement to the contrary, defendant would not be required to make unusual or unnecessary expenditures but only such as the requirements of the case in the opinion of competent physicians justly demanded."

—to the giving of which defendant duly excepted and the exception was allowed.

XXVII.

The Court erred in giving instruction No. 17 as given by the Court in said cause; said instruction being in words as follows:

"The parties being brought into this relation above described the plaintiff may maintain an action for the [327] breach of the implied obligation caused by unskilful, negligent or improper treatment on the part of the defendant, which action is known in law as a tort, and if the plaintiff proves the allegations of his second cause of action by a fair preponderance of the evidence he is entitled to recover damages caused by the unnecessary physical pain, mental suffering and physical disability suffered by him through defendant's negligence or malpractice."

—to the giving of which defendant duly excepted and exception was allowed.

XXVIII.

The Court erred in giving instruction No. 18 as given by the Court in said cause; said instruction being in words as follows:

“You are instructed that if you find from the evidence that the ordinary, natural results of plaintiff’s original injury were aggravated by the failure and refusal of defendant to give him competent surgical and medical care, then your verdict must be for the plaintiff under the second cause of action, and you will then fix his damages at such sum as will reasonably compensate him for impairment of his earning power, if you find his earning power has been impaired by the cause mentioned, and physical and mental suffering to which he has been subjected, if any, due to that cause.

If you find that plaintiff has suffered either temporary or permanent impairment of his earning power, either partial or total, because of the failure and refusal of the defendant to give him competent surgical and medical care after his original injury, he will be entitled to recover damages under his second cause of action, which you will fix according to your estimate of the sum that will compensate him for such impairment.”

—to the giving of which defendant duly excepted and the exception was allowed.

XXIX.

The Court erred in refusing to give instruction No. 5 submitted to the Court by the defendant in said cause and requested by said defendant to be given by the Court to the jury as one of its instructions in said cause; said instruction being in words as follows:

“I instruct you that under the compensation act, under which plaintiff’s first cause of action is brought, an injured employee during the continuance of his disability, if requested by his employer, must submit himself to an examination by a physician or surgeon authorized to practice medicine under the laws of the Territory of Alaska, furnished and paid for by the employer. If any employee refuse to submit himself to such examination his right to compensation shall be suspended during such period of such refusal; and I further instruct you that the defendant company had a lawful right to request said plaintiff to submit to said examination at Ellamar, Alaska, and if you find from the testimony that the defendant company [328] did request the plaintiff to submit to such an examination, he is not entitled to compensation and you should consider this instruction in considering your answer to Question No. 2 herewith submitted.”

—to the refusal to give which the defendant duly excepted and was allowed an exception.

XXX.

The Court erred in refusing to give defendant’s

instruction No. 3 submitted to the Court by the defendant in said cause and requested by said defendant to be given by the Court to the jury as one of its instructions in said cause; said instruction being in words as follows:

“I instruct you that under the hospital contract alleged in the pleadings, the defendant was not bound to furnish plaintiff the services of a specialist in surgery and if the plaintiff was dissatisfied with the treatment he received in the defendant’s temporary hospital at Ellamar or was dissatisfied with the opinion given by Doctor Duckwall as to the condition of his right clavicle on or about the 10th day of February, 1916, then it was the plaintiff’s duty to make his dissatisfaction known to the defendant and demand further medical or surgical aid; and unless you find by a preponderance of the evidence that the plaintiff did demand of the defendant, or its officers, further medical or surgical aid and the defendant refused to give it, then you must find for the defendant and against the plaintiff.”

—to the refusal to give which the defendant duly excepted and was allowed an exception.

XXXI.

The Court erred in refusing to give defendant’s instruction No. 4 submitted to the Court by the defendant in said cause and requested by said defendant to be given by the Court to the jury as one of its instructions in said cause; said instruction being in words as follows:

“I instruct you that the plaintiff, in his second cause of action, cannot recover against the defendant on account of insufficient surgical care and medical and hospital services, which may have aggravated his original injury, for the reason that he has been fully compensated for such injuries in his first cause of action; therefore you cannot find in favor of the plaintiff and against the defendant in any sum whatever on this account.”

—to the refusal to give which the defendant duly excepted and was allowed an exception.

XXXII.

The Court erred in refusing to give defendant's instruction No. 5 submitted to the Court, in regard to plaintiff's second cause of action, by the defendant [329] in said cause and requested by said defendant to be given by the Court to the jury as one of its instructions in this cause; said instruction being in words as follows:

“I instruct you that even if the defendant failed to furnish the plaintiff with timely and sufficient surgical care and medical and hospital services, that it was the duty of the plaintiff to seek surgical aid and medical care, from others, with a view of reducing his alleged claim for damages; and if you find from the evidence that the plaintiff had an opportunity to but failed to do so, then I instruct you that the plaintiff cannot recover any sum whatever against the defendant on account of his alleged permanent disability and his physical and mental suffering subsequent

to the date that he had an opportunity to secure such other surgical and medical care.”

—to the refusal to give which the defendant duly accepted and was allowed an exception.

XXXIII.

The Court erred in refusing to give defendant's instruction No. 6, in regard to plaintiff's second cause of action, submitted to the Court by the defendant in said cause and requested by said defendant to be given by the Court to the jury as one of its instructions in said cause; said instruction being in words as follows:

“I instruct you that plaintiff in his first cause of action seeks to recover compensation for injuries he received in the course of his employment in defendant's mine at Ellamar, Alaska, on the 12th day of January, 1916, and in his second cause of action he seeks to recover damages for the aggravation of said injuries and for mental and physical suffering alleged to have been undergone by reason of defendant's neglect to furnish him timely and sufficient surgical care and medical and hospital care; therefore, I further instruct you before you can find for the plaintiff on his second cause of action, you must be able to determine with reasonable certainty, the amount his original injury has been aggravated and the amount of physical and mental suffering he underwent by reason of the said neglect on the part of said defendant, as separate and apart from the mental and physical suffering he underwent as the natural result of the original injury, and unless you can find this by a pre-

ponderance of evidence, you must find for the defendant and against the plaintiff on plaintiff's second cause of action."

—to the refusal to give which the defendant duly excepted and was allowed an exception.

XXXIV.

The Court erred in refusing to give defendant's instruction No. 7, in regard to [330] plaintiff's second cause of action, submitted to the Court by the defendant in said cause and requested by said defendant to be given by the Court to the jury as one of its instructions in said cause; said instruction being in words as follows:

"I instruct you that from the evidence offered it is impossible to determine with any degree of certainty the amount of physical and mental suffering the plaintiff has undergone by reason of the alleged neglect and refusal of defendant to furnish plaintiff with sufficient surgical care and medical and hospital services, from the physical and mental suffering which would be the natural result of the original injury, therefore any verdict which you might return for plaintiff on his second cause of action would be purely speculative and this the law does not allow; I therefore instruct you that you must find for the defendant and against the plaintiff on plaintiff's second cause of action."

—to the refusal to give which the defendant duly excepted and was allowed an exception.

XXXV.

The Court erred in refusing to give defendant's

instruction No. 9, in regard to plaintiff's second cause of action, submitted to the Court by the defendant in said cause and requested by said defendant to be given by the Court to the jury as one of its instructions in said cause; said instruction being in the words and figures following:

“I instruct you that if you believe from the evidence that Doctor Duckwall was a physician and surgeon authorized to practice medicine under the laws of the Territory of Alaska, at the time he made the examination of the plaintiff on the 10th day of February, 1916, and after making said examination, he notified the plaintiff and the defendant that the plaintiff had entirely recovered from his injury, and the plaintiff then and there made no protest to the opinion expressed by Doctor Duckwall; then I instruct you that the defendant was justified in relying upon the opinion so expressed by Doctor Duckwall, and if the plaintiff, after consulting other physicians, was advised that he was still suffering from said injuries, it was the plaintiff's duty to immediately notify said defendant of this fact and to demand of defendant such further surgical care and hospital and medical treatment as he might need, before he could hold the defendant liable for failure on its part to perform its part of the hospital contract, and unless you find from the evidence that the plaintiff did make such a demand on the defendant and the defendant refused to comply with

such demand, then you must find for the defendant and against the plaintiff.

If you further believe from the evidence that as soon as the defendant company learned that the plaintiff [331] claimed to be suffering from said injury, after he has left Ellamar, the defendant company in good faith offered to give him surgical care and medical and hospital services and that the plaintiff refused to accept the same, then I instruct you that the defendant company did all that was required of it under its hospital contract with plaintiff, and you must find for the defendant and against the plaintiff.”

—to the refusal to give which the defendant duly excepted and the exception was allowed.

XXXVI.

The Court erred in refusing to submit to the jury a form of verdict in regard to plaintiff’s second cause of action, submitted to the Court by the defendant, and requested by said defendant to be given to the jury by the Court, as one of its forms of verdict; said form of verdict being as follows, to wit:

“We, the jury, duly sworn and empaneled to try the above-entitled cause find for the defendant and against the plaintiff on plaintiff’s second cause of action set forth in his third amended complaint.”

—to the Court’s refusal to submit which, defendant duly took an exception and such exception was allowed.

XXXVII.

The Court erred in denying defendant's motion for judgment in favor of defendant notwithstanding the verdict.

XXXVIII.

The Court erred in denying defendant's motion for a new trial.

XXXIX.

The Court erred in making and entering its final judgment in this cause, made and rendered and filed by the Court herein on the 9th day of January, 1917, for the reason that the same is against the law, and is contrary to the law, and is not supported by the evidence, and is not justified by the evidence, there not being sufficient, or any, evidence to support the same; and especially for the reason that it was nowhere shown by the evidence that the plaintiff was permanently disabled, either partially or totally, and it was nowhere shown by the evidence that the defendant received a broken clavicle in the accident he sustained while in the employ of defendant; and, further, the Court erred in making and entering its final [332] judgment allowing plaintiff the sum of one dollar on his second cause of action for the reason that said second cause of action was a common law action and could not be joined with the first cause of action which was a special statutory proceeding and further the Court erred in making and entering its final judgment, allowing plaintiff one dollar on his second cause of action for the reason that said second cause of action was an action *ex contractu* and could not be joined with the first cause of action,

which was an action *ex delicto*.

XXXIX.

The Court erred in making a Minute Order on the 9th day of Jany., 1917, denying defendant's motion for a new trial in this cause.

WHEREFORE, the appellant, Ellamar Mining Company, of Alaska, a corporation, prays that the judgment of the District Court for the Territory of Alaska, Third Division, be reversed.

DONOHOE and DIMOND and
W. S. BONNIFIELD.

Attorneys for Defendant and Appellant, Ellamar Mining Company of Alaska, a Corporation.

Due and legal service, of the foregoing assignment of errors, is hereby accepted, this 16 day of February, 1917.

LYONS & RITCHIE,
Attorneys for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 19, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [333]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Petition for Writ of Error.

Comes now the above-named defendant and says: that on the 9th day of January, 1917, at Valdez, Alaska, the above-entitled court made and entered its judgment in favor of the plaintiff and against the defendant and ordering and adjudging that the plaintiff have and recover from defendant the sum of \$1200 on his first cause of action, the sum of one dollar on his second cause of action and the costs of the action taxed at \$——.

That in said judgment and in the proceedings had prior thereto certain errors were committed to the prejudice of the said defendant all of which more fully appears in the defendant's assignment of errors filed with this petition.

WHEREFORE, defendant prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals of the Ninth Circuit for the errors so complained of, and that the transcript of the record, testimony, proceedings and papers in this cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings be had in the premises as may be proper therein.

DONOHUE & DIMOND and
W. S. BONNIFIELD,

Attorneys for the Defendant and Plaintiff in Error.

Service of the foregoing petition for writ of error, by receipt of copy thereof, acknowledged at Valdez,

Alaska, this 16th day of February, 1917.

LYONS & RITCHIE,
Attorneys for the Plaintiff and Defendant in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 19, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [334]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Order Allowing Writ of Error.

On this 24th day of February, 1917, came the Ellamar Mining Company of Alaska, a corporation, the above-named defendant and plaintiff in error herein, by its attorneys of record. And the said defendant and plaintiff in error by its said attorneys of record filed herein and presented to the Court its petition for the allowance of a writ of error, and praying that a transcript of the records, proceedings and papers upon which the judgment herein was rendered, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit. And at the same time and place said plaintiff in error herein presented to the Court and filed herein its assign-

ment of errors intended to be urged by it.

Now, therefore, in consideration of the premises, and the Court being fully advised in the premises;

IT IS ORDERED: That the aforesaid writ of error be, and the same hereby is, allowed upon the said defendant and plaintiff in error giving bond in the sum of two thousand dollars (\$2,000), conditioned that it will prosecute said writ to effect and answer all damages and costs if it fail to make its plea good, said bond to act as a supersedeas on said writ of error.

AND IT IS FURTHER ORDERED: That a transcript of the record, proceedings and papers in this cause, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Done at Valdez, Alaska, this 24th day of February, 1917.

By the Court:

CHARLES E. BUNNELL,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 24, 1917. Arthur Lang, Clerk.

Entered Court Journal No. 11, Page No. 146.

[335]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Supersedeas and Cost Bond.

KNOW ALL MEN BY THESE PRESENTS, that we, Ellamar Mining Company of Alaska, a corporation organized under the laws of the State of Washington, and the defendant in the above-entitled action, as principal, and Maryland Casualty Company, a corporation organized under the laws of the State of Maryland, as surety, are held and firmly bound unto Tony Possus, the defendant in error, in the full and just sum of two thousand dollars to be paid to the said Tony Possus, his certain attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 24th day of February, in the year of our Lord one thousand nine hundred and seventeen.

WHEREAS, lately in the District Court for the Territory of Alaska, Third Division, in the suit pending in said court between Tony Possus, plaintiff, and said Ellamar Mining Company, of Alaska,

a corporation, defendant, a judgment was rendered against the said Ellamar Mining Company of Alaska, and the said Ellamar Mining Company of Alaska having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the [336] judgment in the aforesaid suit, and a citation directed to the said Tony Possus, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals, for the Ninth Circuit, to be held in the city of San Francisco, in said circuit, on the 24th day of March, next;

NOW, the condition of the above obligation is such that if the said Ellamar Mining Company of Alaska shall prosecute said writ of error to effect and answer all damages and costs if it fail to make the said plea good, then the above obligation to be void, otherwise to remain in full force and effect.

ELLAMAR MINING COMPANY OF
ALASKA.

[Seal]

By C. S. PACKER,
Its Secretary.

Sealed and delivered in the presence of
G. E. de STEIGNER,
MARYLAND CASUALTY COMPANY.

By L. J. WYCKOFF,
Its Attorney in Fact.

[Seal]

Attest: J. A. CATHART,
Its Attorney in Fact.

Approved by

CHARLES E. BUNNELL,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 24, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [337]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Writ of Error.

The President of the United States of America, to
the Honorable CHARLES E. BUNNELL,
Judge of the District Court for the Territory of
Alaska, Greeting:

Because in the record and proceedings, as also in
the rendition of judgment, which is in the District
Court before you, between Tony Possus, the original
plaintiff and defendant in error and Ellamar Mining
Company of Alaska, a corporation, the original de-
fendant and plaintiff in error, manifest error hath
happened to the damage of the said Ellamar Min-
ing Company of Alaska, a corporation, the plaintiff
in error, as is said and appears by the petition
herein:

We being willing that the error, if any hath been,
should be duly corrected, and fully and speedy jus-

tice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that you under seal, distinctly and openly, send the record and proceedings aforesaid with all things concerning the same to the justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, in the State of California, together with this writ, so as to have the same at said place in said circuit on the 24th day of March, 1917, that the record and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States should be done. [338]

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 24th day of February, in the year of our Lord one thousand nine hundred and seventeen.

[Seal]

ARTHUR LANG,
Clerk.

Allowed by:

CHARLES E. BUNNELL,
Judge in the District Court for the Territory of
Alaska, and the Judge Before Whom the Above-
entitled Case was Tried, and Who Rendered
Judgment Therein.

Filed in the District Court, Territory of Alaska,
Third Division. Feb. 24, 1917. Arthur Lang,
Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 11, page No. 146.
[339]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Citation on Writ of Error to Defendant in Error.

The United States of America,—ss.

The United States of America, to Tony Possus,
the Above-named Plaintiff and Defendant in
Error, and to Messrs. Lyons & Ritchie, His
Attorneys:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a Writ of Error filed in the clerk's office for the District Court for the Territory of Alaska, Third Division, wherein Ellamar Mining Company of Alaska, a corporation, the above-named defendant, is appellant, and you are respondent and appellee, to show cause, if any there be, why the said judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 24th day of February, in the year of our Lord one thousand nine hundred and seventeen.

CHARLES BUNNELL,
Judge of the District Court for the Territory of
Alaska.

[Seal]

Attest: ARTHUR LANG,
Clerk.

Filed in the District Court, Territory of Alaska,
Third Division. Feb. 24, 1917. Arthur Lang,
Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 11, page No. 147.
[340]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

**Stipulation as to What shall Constitute the Record
on Writ of Error.**

It is hereby stipulated and agreed by and between the above-named plaintiff and defendant, by their respective attorneys of record, that the hereinafter

named papers and journal entries as the same appear of record in the office of the clerk of the above-named court, shall constitute the record on the writ of error sued out by the above-named defendant, to the Circuit Court of Appeals, for the Ninth Circuit, from the final judgment made and entered in the above-entitled court and cause on the 9th day of January, 1917, to wit:

1. BILL OF EXCEPTIONS CONSISTING OF:

- (a) Plaintiff's third amended complaint;
- (b) Defendant's Demurrer to plaintiff's third amended complaint;
- (c) Minute Order of Court overruling defendant's demurrer to plaintiff's third amended complaint; said minute order being made and entered on the 28th day of December, 1916, entered Court Journal 11, page 84;
- (d) Defendant's Answer to plaintiff's third amended complaint;
- (e) Plaintiff's motion to strike parts of defendant's answer;
- (f) Defendant's answer to plaintiff's third amended complaint;
- (g) Plaintiff's reply;
- (h) Journal record of proceedings had at trial, Court Journal 11, pages 97 to 100, inclusive;
- (i) Certified transcript of record of evidence and proceedings at trial by the Court reporter;
- (j) Verdict and Special Finding of Jury;

- (k) Motion of defendant for judgment in its favor notwithstanding the Verdict of the Jury;
- (l) Minute order denying motion of defendant for judgment notwithstanding the verdict entered the 9th day of January; entered Court Journal 11, page 106;
- (m) Motion for New Trial by defendant;
- (n) Minute Order of Court denying defendant's motion for New Trial, made the 9th day of January, 1917, entered Court Journal 11, page 106;
- (o) Remittitur of part of Verdict by plaintiff;
- (p) Judgment;
- (q) Minute order of Court granting defendant until the 15th day of February, 1917, in which to prepare, file and settle its Bill of Exceptions upon appeal; said minute order being entered on the 9th day of January, 1917, in Court Journal 11, page 107; [341]
- (r) Order of Court, made and entered February 13, 1917, granting defendant until and including the 10th day of March, 1917, within which to prepare, file and settle its bill of exceptions on writ of error;
- (s) Order settling and certifying bill of exceptions on writ of error;

2. Assignment of errors;

3. Petition for writ of error;
4. Order allowing writ of error;
5. Bond on writ of error;
6. Writ of error;
7. Citation to defendant in error;
8. Stipulation as to what shall constitute record on writ of error; this stipulation;
9. Acknowledgment of service of papers on writ of error by defendant in error;
10. Certificate of Clerk of Court to transcript.

Dated at Valdez, Alaska, this 24th day of February, 1917.

LYONS & RITCHIE,

Attorneys for the Plaintiff and Defendant in Error.

DONOHUE & DIMOND and

W. S. BONNIFIELD,

Attorneys for the Defendant and Plaintiff in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska. Third Division. Feb. 24, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [342]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Acknowledgment of Service of Papers on Writ of Error.

Service upon the plaintiff and defendant in error herein, Tony Possus, by the defendant and plaintiff in error, Ellamar Mining Company of Alaska, of the following named papers upon writ of error in said cause to the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, is hereby acknowledged, to wit:

Petition for Writ of Error, Assignment of Errors, Bond on Writ of Error, Writ of Error, Citation on Writ of Error, Stipulation as to what shall Constitute Record on Writ of Error.

And the said plaintiff and appellee hereby acknowledges receipt of copies of the foregoing papers.

Dated at Valdez, Alaska, this 24th day of February, 1917.

TONY POSSUS,
Plaintiff and Defendant in Error,
By LYONS & RITCHIE,
By JOHN LYONS,

Attorneys for Plaintiff and Defendant in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 24, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [343]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

United States of America,
Territory of Alaska,
Third Division,—ss.

I, Arthur Lang, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the foregoing and hereto annexed 347 pages of typewritten matter, consisting of pages numbered from 1 to 344, inclusive, are and constitute a full, true and correct copy of the record, the bill of exceptions, the assignment of errors, and of all proceedings in the above-entitled cause, and the original Writ of Error and original Citation issued in said cause.

This transcript is made in accordance with the stipulation between the appellant and appellee herein as to what should constitute the record in said cause upon writ of error.

I further certify that the foregoing transcript has been prepared, examined and certified to by me, and

No. 2949 8

IN THE
UNITED STATES
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ELLAMAR MINING COMPANY OF ALASKA, a Corporation,

Plaintiff in Error.

vs.

TONY POSSUS,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT OF THE TERRITORY
OF ALASKA, THIRD DIVISION

BRIEF OF PLAINTIFF IN ERROR

DONOHUE & DIMOND, MAY 3 - 1917

and

W. S. BONNIFELD, F. D. Monckton

Attorneys for Plaintiff in Error.

Filed

Clerk

IN THE
UNITED STATES
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ELLAMAR MINING COMPANY OF ALASKA, a Corporation,

Plaintiff in Error.

vs.

TONY POSSUS,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT OF THE TERRITORY
OF ALASKA, THIRD DIVISION

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE.

This cause comes here on a Writ of Error sued out by the defendant below, to reverse a judgment rendered against said defendant in the court below, in an action at law for the recovery of damages for personal injuries alleged to have been sustained by plaintiff (defendant in error), by reason of an alleged accident while plaintiff was working for Ellamar Mining Company of Alaska, a corporation, defendant

(plaintiff in error), in said company's mine at Ellamar, Alaska.

For convenience, in this brief, the parties will be referred to as designated in the Court below.

The third amended complaint (R. pp. 4-5-6-7-8-9) alleges that defendant Ellamar Mining Company of Alaska, a corporation, is organized under the laws of the State of Washington and doing business in Alaska and at all times hereinafter mentioned was engaged in operating a copper mine at Ellamar, Alaska, in the Third Judicial Division of said Territory.

The said complaint further alleges that on or about the 12th day of January, 1916, and for about eight months prior thereto plaintiff was in the employ of defendant as a miner, usually engaged in operating a machine drill. On the date named plaintiff was working on the night shift on the 100 foot level of said company's mine. At about eight o'clock P. M., he and another miner named Louis, who was working with him, were ordered by the shift boss, Oscar Johnson, to leave their work and go to another part of the mine to assist in removing a slide that had just fallen. In order to reach the slide they were directed by said shift boss to ride upon a car down a track which ran to the glory hole about 1000 feet distant. Plaintiff and said Louis mounted said car and started same down the track, plaintiff riding in front. At the end of the track the car ran against a rock wall at the edge of the glory hole. In the contact of the car with said wall plaintiff was pinned under the car and

sustained the following injuries, to-wit: fracture of the right clavicle with separation limiting the motion of the right arm and shoulder; a severe bruise adjacent to the left eye which temporarily destroyed the sight so that the same was not fully restored for three months; a violent blow upon the jaw which badly bruised the same, knocked out one tooth, broke another tooth and partially paralyzed the use of the jaw for three months.

The complaint further alleges that at the time of suffering said injury plaintiff was a strong, healthy man, thirty-three years of age, an experienced and competent hard-rock miner and drill-man, able to earn the highest wages paid for such work, and at that time was receiving four dollars a day from defendant for his work, and that he has a mother dependent upon him for support; that he is unable to state, and is informed by competent surgical advice that it cannot be determined positively to what extent, if any, his said injury caused permanent disability but he believes that the same caused total disability for at least six months, and permanent partial disability to the extent of at least one-third of his earning power.

SECOND CAUSE OF ACTION.

The complaint further states as a second cause of action that plaintiff had been working in said mine for eight months prior to the date of said accident, and according to the rules of said mine the sum of \$1.50 per month had been deducted from his wages

for hospital dues, which entitled him to care in a hospital and to competent surgical and medical attendance at the expense of defendant in case of his injury or illness arising in the course of his employment. Plaintiff alleges that after said accident he was taken to a house used by defendant as a hospital and kept there about twelve days, but no qualified surgeon or physician was in attendance upon him at any time, and no examination of his injuries was made or attempted to be made except by a woman who had charge of said hospital, one Mrs. Tramontine, who was not a physician or surgeon or even a trained nurse. He was assured by said woman that he had no injuries except bruises of the flesh and that there were no bones broken and that about twelve days after his injuries he was ordered out of the hospital by the general foreman, one Gedney, and that he received no further care from defendant company.

The complaint further alleges in the second cause of action (R. 7-8).

“That during his stay in the hospital his injuries were not properly or sufficiently dressed and medicated and no care whatever was given to his broken clavicle. Plaintiff alleges that because of the wilful failure and refusal of defendant to give him timely and necessary surgical care to which he was entitled as aforesaid he has suffered great physical pain and mental torture for a long time after he might have recovered as fully as the nature of his injury permitted, thru proper surgical and medical care. That said unnecessary suffering has been due wholly to the gross negligence and the wilful failure and refu-

sal of defendant to give him the surgical attention and medical attendance to which he was entitled as aforesaid, and his present impaired physical condition is largely due to the same gross and wilful negligence of defendant, and the aggravation of his disability beyond the normal result of his original injury is wholly due to that cause.”

The complaint further alleges in the second cause of action that because of defendant’s

“neglect and refusal to furnish him timely and sufficient surgical care and medical and hospital service which aggravated the result of his original injuries as aforesaid and his permanent disability and the unnecessary physical and mental suffering he has undergone he has been damaged in the sum of Fifteen Thousand Dollars (\$15,000) (R. p. 8).”

Defendant answered admitting all of the allegations contained in plaintiff’s first cause of action except that the plaintiff had his right clavicle fractured with separation limiting the motion of his right arm and shoulder or that his said clavicle was fractured or broken at all or that the motion of his right arm or right shoulder was in any manner limited other than such as bruises of the flesh and muscles would cause; denying that the sight of his left eye was temporarily destroyed or destroyed at all or in any manner impaired, or that he had a mother dependent upon him, or that surgical aid and skill could not determine to what extent the said injury caused permanent or total disability. In answer to the plaintiff’s second cause of action defendant admitted the allegations re-

ferring to plaintiff's being in the employ of the company at the time of the accident; the amount of wages he was receiving; the amount of money deducted from his wages as hospital dues, but denying each and every other allegation therein contained, and alleging affirmative defenses to each of the two causes of action contained in the said complaint setting up a non-compliance, on the part of plaintiff, with the terms of Chapter 71 of the Session Laws of the Alaska Legislature of the year 1915, which Chapter is entitled, "An Act relating to the measure and recovery of compensation of injured employees in the mining industry of this Territory, and the compensation to designated beneficiaries where such injuries result in death, defining and regulating the liability of employers to their employees in connection with such industry, and repealing all Acts and parts of Acts in conflict with this Act," and also negligence on the part of said plaintiff in not complying therewith.

The affirmative defenses were denied in a reply (R. 49-50-51) filed by plaintiff; and the issues as defined by the third amended complaint, answer and reply, came on for trial before Hon. Charles E. Bunnell, Judge of said Court, and a Jury.

At the close of plaintiff's evidence defendant moved the Court to instruct the Jury to return a verdict on plaintiff's second cause of action, in favor of the defendant and against the plaintiff for the reason that the evidence offered in support of the second cause of action was uncertain and indefinite and it

was absolutely impossible for the jury to determine what part of the suffering was caused or was due to the alleged negligence of the defendant in not furnishing proper medical and surgical treatment and what part of the suffering was due to the original injury and that any verdict found for plaintiff on his second cause of action would be purely speculative and further than it was absolutely impossible for the jury to determine to what extent the original injury had been aggravated by reason of the alleged negligence of the defendant in not furnishing proper medical and hospital treatment; and further that any damages sustained by plaintiff by reason of the injuries he suffered on the 12th day of January, 1916, would be fully compensated by the findings of the jury in plaintiff's first cause of action; and to permit plaintiff to recover any damages under his second cause of action would be permitting him to recover damages twice for the same cause. After this motion was denied defendant moved the Court for a non-suit against plaintiff on the second cause of action on the grounds presented in defendant's motion for an instructed verdict. These motions were denied and exceptions duly taken were allowed (R. pp. 180-181-182-183). The defendant then put in its evidence.

Thereupon the Court instructed the jury as to the law of the case. It first instructed them as to the law applicable to the case, in the absence of special statutory provisions (R. pp. 304-305-306-307).

Later the Court instructed the jury as to "the law as it exists under and by virtue of 'the Work-

men's Compensation Act' '' (R. pp.307-308-309-310; then the Court submitted certain findings to the jury on the first cause of action, as set out in plaintiff's third amended complaint and then submitted to the jury instructions covering the law governing these special findings (R. pp. 311-312-313-314).

The Court then submitted instructions to the jury covering the law concerning plaintiff's second cause of action (R. pp. 315-316-317-318-319-320-321).

Defendant requested the Court to give the jury certain instructions, most of which instructions were refused (R. pp. 325-326-327-328-330-331), to which refusal defendant excepted and its exceptions were allowed (R. p. 332). Thereupon the defendant requested the Court to submit a form of verdict to the jury which request was denied (R. p. 333) to which an exception was taken and allowed; thereupon the defendant objected to the form of verdict the Court was submitting to the jury; which objection was denied and an exception allowed (R. pp. 333-334).

A verdict was rendered against the defendant on the first cause of action for the sum of \$1368 and on the second cause of action for the sum of One Dollar. (R. p. 338). After the verdict defendant made a motion for a New Trial for the following reasons (R. pp. 342 to 355):

I.

That the damages allowed by the jury were excessive and were given under the influence of passion and prejudice.

II.

That there was insufficiency of evidence to justify the verdict and that the same was contrary to law.

III.

Error in law occurring at the trial and excepted to by the party making the application.

The motion for a new trial was denied, to which ruling defendant excepted and such exceptions were allowed (R. 354).

There is very little dispute as to when and how plaintiff sustained injuries. There is no dispute as to plaintiff's being in the employ of defendant at the time of the accident or that he received injuries in the accident, but it is disputed as to plaintiff having his clavicle broken by reason of this accident, and of his right arm being permanently partially disabled by reason of his clavicle being broken. It is also disputed as to plaintiff having suffered mental anguish and pain by reason of the wilful negligence and neglect of defendant in not furnishing plaintiff timely and sufficient aid and necessary surgical care to which he was entitled (R. 40-41).

QUESTIONS INVOLVED.

The questions involved in this Statement of Facts and presented here by the Assignment of Errors together with the manner in which these questions are raised upon the record are as follows:

I.

(a) Plaintiff in Error contends that it was the duty of the trial Court to decide as a matter of law

whether this action should be based upon a common law liability or upon a liability under the "Workmen's Compensation Act" as passed by the Alaska Legislature in the year 1915, and instruct the jury accordingly; that it appeared conclusively under the pleadings and evidence, that the defendant Ellamar Mining Company of Alaska, a corporation, was a mining company in the Territory of Alaska at the time of plaintiff's injury within the terms of said Act, and therefore that plaintiff could only maintain this action against the defendant, under this Act, after proving that he was injured while in that company's employ; and that any injury plaintiff sustained by reason of any negligence on the part of defendant in not giving him proper medical care and attention was fully covered by the compensation designated by the provisions of said Act; and therefore, plaintiff could not maintain this action upon his second cause of action which is a common law action, but could only maintain this action against the defendant under the said "Compensation Act."

(b) That plaintiff could not maintain this action under both of his causes of action, basing his right to recover on his first cause of action upon the statute, and basing his right to recover on his second cause of action upon the common law, nor could he sue the defendant, relying both on the common law and the statute; that on account of such misjoinder the judgment against the defendant cannot stand, under the pleadings and evidence in this case; and that the court erred in instructing the jury as to the rules

of law applicable to an action based upon the common law and also to an action based upon the statute.

These questions are raised upon the record by the following Assignments of Error: i, viii, ix, x, xi, xiii, xviii, xix, xxi, xxiv, xxv, xxvii, xxviii, xxiv, xxxv and xxxix.

II.

Defendant contends that even if its foregoing position is not correct, and if this action could be maintained against the defendant on both causes of action, then that the evidence wholly fails to show any cause of action or right to recover against the defendant on either cause of action, for the following reasons:

(a) Plaintiff did not show that he received a broken or fractured clavicle limiting the separation of the right arm and shoulder while he was in the employ of defendant company.

(b) The evidence as directed toward plaintiff's second cause of action fails to show any negligence on the part of this company in not furnishing plaintiff with proper medical and surgical treatment.

(c) If the action should be based on the second cause of action the evidence shows as a matter of law that plaintiff cannot recover because of his negligence in not submitting to an examination and in his refusal to accept massage treatment for the muscles.

(d) If the action is based on the statute then the evidence shows that plaintiff did not receive the injury of a broken clavicle while in the employ of the defendant.

These questions are raised upon the record by the following Assignments of Error: viii, ix, xxi, xxii, xxiii, xxvii, xxviii, xxix, xxx, xxxi, xxxii, xxxiii, xxxiv, xxxvi, xxxvii, xxxviii, xxxix. (R. pp. 363 to 400).

III.

Plaintiff in Error contends that even if it is incorrect in all its foregoing contentions, and if the action can be maintained against this defendant on both causes of action under the evidence and the pleadings, nevertheless the Court erred in the trial of the case in giving and refusing to give instructions to the jury, which errors were highly prejudicial to this defendant, and because of which the judgment of the trial Court should be reversed and a new trial granted.

These questions are raised upon the record by the following Assignments of Error: xxiv, xxv, xxvi, xxvii, xxix, xxxii, xxxiii, xxxiv, xxxv, xxxvi, xxxvii, xxxviii, xxxix (R. pp. 389 to 402).

SPECIFICATION OF ERRORS RELIED UPON.

I.

The Court erred in making and entering its Minute Order of the 28th day of December, 1916, (R. 13-14) overruling the demurrer of defendant to plaintiff's third amended complaint.

II.

The Court erred in making and entering its Order on the 30th day of December, 1916, sustaining plaintiff's motion to strike from the first paragraph

of defendant's affirmative defense to plaintiff's first cause of action the following:

"That shortly after said physician and surgeon notified said plaintiff as aforesaid, that he, the plaintiff had fully recovered from the injuries he received in said accident plaintiff voluntarily left Ellamar, Alaska, and without the defendant's knowledge and without making any demand whatever on the defendant for compensation for his injuries; that the defendant or none of its officers, had any knowledge of the whereabouts of said plaintiff from the time he left Ellamar, as aforesaid, until on or——" (R. p. 32).

III.

The Court erred in making and entering its Order on the 30th day of December, 1916, sustaining plaintiff's motion to strike from the second paragraph of defendant's affirmative defense to plaintiff's first cause of action, the following:

"The defendant thereupon acting through his said physician and surgeon, offered to furnish plaintiff board and lodging free and to give him daily massage treatment of the muscles for the purpose of relieving them of the alleged soreness and to continue this treatment and such other treatment as might be necessary until plaintiff was entirely relieved of said soreness; this offer plaintiff positively refused and thereupon demanded of defendant the sum of twenty five hundred dollars and upon the defendant refusing to pay said sum plaintiff departed from Ellamar and refused to permit said physician and surgeon to treat him in any manner whatever" (R. pp. 32-33).

IV.

The Court erred in making and entering its Order on the 30th day of December, 1916, sustaining plaintiff's motion to strike from defendant's affirmative defense to plaintiff's first cause of action all of paragraph four (R. 33).

V.

The Court erred in making and entering its Order on the 30th day of December, 1916, sustaining plaintiff's motion to strike from the second paragraph of defendant's affirmative defense to plaintiff's second cause of action, the following: .

“In order to better care for its employes who were slightly injured and to better administer first aid to those who might be seriously injured” (R. p. 33).

VI.

The Court erred in making and entering its Order on the 30th day of December, 1916, sustaining plaintiff's motion to strike from the second paragraph of defendant's affirmative defense to plaintiff's second cause of action, the following:

“And shortly thereafter departed from Ellamar and defendant heard nothing of plaintiff and did not know of his whereabouts for more than two months thereafter” (R. 34).

VII.

The Court erred in making and entering its Order on the 30th day of December, 1916, sustaining plaintiff's motion to strike from the fifth paragraph of defendant's affirmative defense to plaintiff's sec-

ond cause of action, the following:

“And thereupon demanded of defendant the sum of twenty-five hundred dollars and upon the defendant refusing to pay said sum plaintiff departed from Ellamar and refused to permit said physician and surgeon to treat him in any manner whatever” (R. p. 34).

VIII.

The Court erred in overruling defendant's objection to any testimony whatever being received in this trial on either cause of action contained in plaintiff's third amended complaint upon the ground that there are two causes of action improperly united in said complaint in this (R. pp. 59-60-61-62):

(a) Plaintiff's first cause of action as set forth in his third amended complaint, is an action *ex delicto* and plaintiff's second cause of action is an action *ex contractu*.

(b) Plaintiff's first cause of action as set forth in his third amended complaint, is a special statutory proceeding and plaintiff's second cause of action is a common law action.

IX.

The Court erred in overruling defendant's objection to a question asked by plaintiff's counsel which said question and objection and the exception allowed by the Court upon overruling the said objection, is set forth on pages 70 and 71 of this Record and are in words, following:

“Q. How long did he suffer any pain or handicap in the use of his jaw?

MR. DONOHUE—We object to that question at this time on the ground that if the evidence is applied to the first cause of action it is incompetent, irrelevant and immaterial and I would like at this time to find out what would be the theory of the Court in trying this case, whether the first cause of action may be proven first and then the second or whether the evidence will be intermingled in the two causes of action—I am at a loss to know how to proceed on it.

THE COURT—Of course counsel will present the questions directed toward the first cause of action first but I anticipate that some of the questions which would be presented would also apply to the second cause of action. The objection will be overruled and defendant allowed an exception.”

X.

The Court erred in overruling defendant’s objection to any testimony being offered in any manner tending to prove the allegations of plaintiff’s second cause of action contained in plaintiff’s third amended complaint. Said objections being made on the following grounds:

(a) That the complaint so far as that action is concerned does not state facts sufficient to constitute a cause of action.

(b) That it commingles the two causes of action together in such a manner that the jury will not be able to determine one from the other with any degree of certainty or definiteness” (R. p. 72).

XI.

The Court erred in allowing testimony to be in-

troduced over the objection of defendant which testimony and objections and the ruling of the Court in overruling said objection appear on pages 72 and 73 of this record are in the words following:

“Q. What kind of a bandage?”

Mr. DONOHUE—We make the same objection.

Objection overruled; defendant allowed an exception.

Q. Did she put anything else on besides the bandage?

Mr. DONOHUE—We object to that as leading.

Objection overruled; defendant allowed an exception.

Q. How long did she leave the bandage on you?

A. It was taken off next day.

Q. Did she put any other bandage on?

A. Just a plaster was left.

Q. How long did that remain on.

A. He says it was taken off the very next day after the second.

Q. Was there anything else placed on him then, after that?

A. He says some liquid, something in liquid form was put on his shoulder—some medicine in liquid form.

Q. Tell him to describe that plaster—how much of his body or shoulder did that cover?

Mr. DONOHUE—I have an objection and exception to all this line of testimony.

The COURT—Yes, sir.”

XII.

The Court erred in allowing testimony to be introduced over the objection of defendant, which tes-

timony and objections and the ruling of the Court appear on page 74 of this record and are in words following:

“Q. Did anybody connected with the company, that is, any officer of the company, come to see you at any time after you went into the hospital?

MR. DONOHUE—We object to that question on the ground that it is incompetent, irrelevant and immaterial. It has been ruled out in the pleadings, that paragraph regarding the attempts to get a release from this man, and we object to its being testified to at this time because it is not within the pleadings.

By the COURT—He may answer; the objection will be overruled. Defendant allowed an exception to the ruling.”

XIII.

The Court erred in allowing testimony to be introduced over the objection of defendant, which testimony, objection and the ruling of the Court appear on pages 75 and 76 of this record and are in the words following:

“Q. What did Mr. Estey say if anything?

MR. DONOHUE—We object to that question on the ground that it is incompetent, irrelevant and immaterial and not within the issues joined by the pleadings.

MR. RITCHIE—We maintain it is admissible to support the second cause of action, showing the attitude of the company toward this plaintiff from the time of the accident until the present time and is part of the *res gestae*.

By the COURT—Mr. Interpreter, did you give

the entire answer to the last question?

The INTERPRETER—Yes, your Honor, I did.

The COURT—That was all of his answer?

The INTERPRETER—Yes.

By the COURT—He may answer the question. The objection will be overruled and defendant allowed an exception.

A. When he came to see him, he brought a paper to sign to him.

Q. What did he say about that paper?

Same objection; objection overruled—defendant allowed an exception.

A. He said Mr. Estey said to him, you sign this paper—if you sign your paper you get your half pay; if you don't sign we are going to throw you out the next day."

XIV.

The Court erred in allowing testimony to be introduced over the objection of defendant, which testimony, objection and the ruling of the Court appear on page 77 of this record and are in the following words:

"Q. Did he come there at any time afterward?

Mr. DONOHUE—We object to that question on the ground that it is incompetent, irrelevant and immaterial and on the further ground that it is shown by the plaintiff's testimony that Mr. Gedney had no power to bind the defendant company in any manner whatever. He has already testified that Mr. Estey was in full command of the affairs there during the time of this accident.

Objection overruled; defendant allowed an exception."

XV.

The Court erred in overruling defendant's objection to the introduction of testimony, which testimony, objection and the ruling of the Court appear on page 79 of this record and are in the following words:

“Q. Why did you leave the bunk-house?

Mr. DONOHUE—We object to that as incompetent, irrelevant and immaterial and not within the issues joined by the pleadings.

Objection overruled; defendant allowed an exception.”

XVI.

The Court erred in allowing plaintiff to answer a question, over the objection of defendant, which question, objection and the ruling of the Court appear on page 81 of this record and are in the words following:

“Q. Have you given or sent anything to your mother for her support of late years?

Mr. DONOHUE—We object to that as leading.

The COURT—It is leading but he may answer the question.

Mr. DONOHUE—We also object on the ground that the question is too indefinite; he says, has he given her or sent her anything within the last few years; that doesn't bring it within the scope of my understanding of the law.

Mr. RITCHIE—I can't cover it all at once.

By the Court—I presume counsel will cover that by further questions. Tell him to answer yes or no, whether he has given his mother anything since he came to America for her support.”

Defendant allowed an exception to the ruling.”

XVII.

“The Court erred in allowing testimony to be introduced over the objection of defendant, which testimony is as follows (R. pp. 83-84):

“Q. Have you suffered any pain from your injuries?

MR. DONOHUE. We object to that question on the ground that it is incompetent, irrelevant and immaterial. So far as the first cause of action is concerned it doesn't matter whether he suffered pain or not, if directed to the second cause of action, the two actions are so intermingled that it would be impossible for the jury with any degree of certainty to determine what portion of this pain and suffering would apply to the one cause and what would apply to the other cause.

A. He says he pains occasionally now yet from the injury. He says right in his shoulder is the pain and he says occasionally he has pains in his head. He says he doesn't have no pain when he doesn't use his arm or move his arm, but when he moves the arm then he has got a pain in his shoulder. He says—No he didn't try—it is always painful to lift his arm and his arm pains yet.”

XVIII.

The Court erred in allowing testimony to be introduced over the objection of defendant, which testimony, objection and the ruling of the Court appear on pages 111 and 112 of this record, and are in the following words:

“Q. Why did you leave the bunk-house and go to Jim Fielders?

Mr. DONOHUE—We object to that as repetition.

The COURT—He may answer. Objection overruled; defendant allowed an exception.

Q. What did he say; tell him to give the exact words Mr. Estey used if he remembers?

Mr. DONOHUE—We object to that question on the ground that there is nothing in the pleadings complaining of this treatment by Mr. Estey.

The COURT—He may answer. The objection will be overruled and exception allowed.

A. He said, get out of her you Bohunk son-of-a-bitch—that is just what he said.”

XIX.

The Court erred in allowing testimony to be introduced over the objection of defendant, which testimony, is as follows:

“Q. Are you able to say, if you are able to say, state, what, in your opinion is the degree of impairment of the plaintiff’s strength in the use of his shoulder and consequent impairment of his earning power by the failure to properly set this bone and have it corrected in the proper and natural way?

Mr. DONOHUE. To which question we object as incompetent, irrelevant, and immaterial in so far as it applies to the second cause of action. We have no objection to this testimony as applied to the first cause of action.

A. In answering that question I can only give my opinion that the man in his present condition is impaired from performing his function, his vocation as a laboring man. If his vocation

is that of a miner, I would say—yes requiring the use of both of his arms. As I have previously stated, if the man had the benefit of a masseur, months it would probably take, there would probably be considerable improvement in the use of that right arm, possibly there might not be. I am inclined to question whether he will” (R. p. 144).

XX.

The Court erred in allowing testimony to be introduced over the objection of defendant, which testimony, objection, and the ruling of the Court appear on pages 174 and 175 of this record and are in the following words:

“Q. Tell what happened there?

Mr. DONOHUE—We object to that question on the ground that it is incompetent, irrelevant and immaterial, and not within the issues joined by the pleadings. It comes back to the proposition of the part of the complaint which was stricken out on our motion in the first complaint, and goes to the question of signing a release to the company.

Objection overruled, defendant allowed an exception.

The COURT—*Who was present first and when was it?* A. Mr. Estey.

Q. Anybody else?

A. After a while came Mr. Gedney—after ten or fifteen minutes came Mr. Gedney.

Q. What was said by Tony and Mr. Estey and Mr. Gedney?

A. Mr. Estey told Tony to sign papers, this paper—it says it was nobody’s fault—it is Tony’s fault himself. He said I never signed this paper because it is not my fault, and Mr. Estey told

him, If you not sign this paper the Company charge you for board while you are in the hospital and Tony said, I can't help it—that is all.

Q. Did you at any time in the office or the store of the Company hear any conversation between Tony and either Mr. Gedney or Mr. Estey?

A. No, I did not.

Q. Was that the only time in the office or the store of the Company hear any conversation between Tony and Mr. Estey?

A. Yes, sir—after a while Mr. Estey he go and talk to Mr. Gedney.

Mr. DONOHUE—We object to any testimony about Mr. Gedney because Mr. Gedney was not in charge of the mine at that time as shown by the plaintiff's own testimony.

The COURT—The last part of that answer regarding Mr. Gedney may be stricken."

XXI.

The Court erred in denying the motion of defendant, made for defendant at the close of the plaintiff's case, to instruct the jury to return a verdict in favor of defendant and against the plaintiff, for the following reasons (R. pp. 180-181-182-183):

(a) Plaintiff in the second paragraph of his reply to the defendant's affirmative defense to plaintiff's second cause of action admits that the only hospital treatment he knew he would receive in case he was injured, in consideration of the \$1.50 per month, deducted from his wages as hospital dues, was as follows: 'He knew the defendant had a house equipped as a sort of crude hospital with a woman in charge of the same.' He knew nothing of any further method

of caring for the injured employees and never had any conversation with any of the company's officials regarding the deduction of a dollar and a half a month from his wages for hospital dues or what it would entitle him to in case he was injured while in the defendant's employment.

The evidence shows conclusively that so far as he was concerned he received all the hospital care and attention to which he was entitled under his alleged hospital contract.

(b) That the evidence offered by the plaintiff wholly failed to sustain plaintiff's second cause of action.

(c) That the evidence offered by the plaintiff in support of his second cause of action is uncertain and indefinite and from this evidence it is impossible for the jury to determine with any degree of certainty that portion or part of the plaintiff's alleged suffering and pain is, or was due to the alleged negligence of defendant in not furnishing plaintiff with timely and sufficient surgical care and medical and hospital services, and what portion or part of plaintiff's alleged suffering and pain was due to the original injury, and any verdict found by the jury in favor of plaintiff on his second cause of action would be purely speculative, as the damage, if any, sustained by plaintiff, under his second cause of action, is entirely too remote and uncertain to be ascertained from the evidence.

(d) That the evidence offered by plaintiff in support of his second cause of action is uncertain and in-

definite and from the evidence it is impossible for the jury to determine with any degree of certainty the extent, if any, to which the original injury has been aggravated by reason of the alleged negligence of the defendant in not furnishing plaintiff with timely and sufficient surgical care and medical and hospital services, and any verdict found by the jury in favor of plaintiff's second cause of action would be purely speculative, as the damages, if any, sustained by plaintiff under his alleged second cause of action are entirely too remote to be ascertained from the evidence.

(c) That any damages sustained by plaintiff by reason of the injuries he sustained on the 12th day of January, 1916, or in any manner growing out of the said injuries will be fully compensated by the findings of the jury in plaintiff's first cause of action and to permit the plaintiff to recover any damages whatever under his second cause of action would be allowing him to recover twice for the same cause.

XXII.

The Court erred in sustaining the motion and objections made by plaintiff to the questions asked George Newlove, a witness for defendant, during his direct examination while a witness on the stand in behalf of defendant; appearing at pages 288 and 289 of this record in the following words:

“Q. Since you examined the plaintiff on the third day of January have you had occasion to examine another man whose right clavicle was fractured and a union affected? A. I have.

Mr. RITCHIE—We move to strike the answer and interpose the objection that it is irrelevant and immaterial—the doctor has already testified that there is a good deal of variance between clavicles and individuals.

Mr. DONOHUE—We propose to follow this testimony by placing a man on the stand by whom we will demonstrate that the overlapping of his right shoulder, his right clavicle, far exceeds any overlapping claimed in this case of plaintiff and will demonstrate to this jury that he has absolutely free and complete use of his arms in any manner he sees fit to use them, and we will propose later on to place these two men, this man and plaintiff, side by side before this jury so they can see absolutely the condition of the two clavicles and the use of their respective arms.”

After argument by counsel the motion to strike the answer was by the Court granted and the objection sustained. To which ruling of the Court counsel for defendant was allowed an exception.

“Q. Doctor, in this examination of the man referred to in the last question, did you discover whether or not in the union of the clavicle there was an overlapping of the two ends of the bone?

Mr. RITCHIE—We object to this question as to all similar questions on the ground that Doctor Newlove qualified as an expert on this, and he can testify either from his general knowledge of a great many cases or what he has learned from the books as to the results of overlapping or any other condition, but to take a particular isolated case and state that in that case something similar had not resulted in a permanent

injury would be simply making all cases stand as an exception.

The objection was by the Court sustained; defendant allowed an exception to the ruling.

Q. Doctor, will you name the man whom you have examined since examining the plaintiff, who had an overlapping of his right clavicle in affecting a union after a fracture?

Mr. RITCHIE—We object as irrelevant and immaterial.

Objection sustained; defendant allowed an exception.

XXIII.

The Court erred in sustaining the objection made by plaintiff to the questions asked Harry W. Ells, in his direct examination, while a witness on the stand in behalf of the defendant, which questions, objections and ruling of the Court are in the following words:

“Q. Did you some time ago receive a fracture of your right clavicle or collar-bone?

Mr. RITCHIE—We object to that as incompetent and irrelevant.

Objection sustained; defendant allowed an exception.

Q. How long after receiving an injury that resulted in the fracture of the right clavicle was it before you resumed work?

Same objection.

The COURT—The objection will be sustained. He has not testified he had a broken clavicle.

Mr. DONOHUE—I know, but I don't know how else I can get this into the record.

The COURT—In order that counsel may un-

derstand the Court's position, it is simply this: You have called expert witnesses to testify from their knowledge and experience. Now, it would certainly not be proper, on the theory of expert witnesses, to now call in the parties from whom they may have gained their experience. They have testified as expert witnesses.

Mr. DONOHUE—No, I do not propose to do that. In the examination yesterday Doctor Boyle was permitted to have the plaintiff take his clothing off the upper part of his body and was permitted to demonstrate to the jury a depression in his shoulder and to demonstrate in the shoulder what he called a malformation of the collar-bone or clavicle. With this witness I propose to demonstrate a greater depression and a greater malformation of the clavicle, demonstrate by this man that he hasn't the slightest bit of trouble using his right arm in any manner conceivable, and further propose to stand the two men up there, side by side, so the jury could examine them and pass upon them themselves. It is a demonstration—not expert testimony—just as the plaintiff had a right to put in a photograph of the right clavicle from a book on anatomy—we certainly have the right to introduce this witness for that purpose. I am endeavoring to show to this jury the improbability that this plaintiff's arm is affected the least bit by the malformation he claims in his clavicle, by showing another man who has a similar or more extensive malformation, who has the full use of his arm.

The COURT—The objection will be sustained and defendant allowed an exception.

Q. Did you enter the United States Army as a recruit subsequent to receiving a fracture in the right clavicle?

Mr. RITCHIE—We object as incompetent and irrelevant.

Objection sustained; defendant allowed an exception.

Q. Have you any difficulty in using your right arm in any position you choose to use it in?

Same objection; objection sustained; defendant allowed an exception to the ruling.

Q. Have you any difficulty in extending your right arm perpendicularly over your head and shoulders?

Same objection; objection sustained; defendant allowed an exception" (R. 300-1-2).

XXIV.

The Court erred in giving the following part of Instruction No. II, to which plaintiff in error duly excepted and its exception was allowed (R. p. 313); (R. p. 323):

"You are instructed that if the defendant in this case denied the existence of injuries or disability suffered by plaintiff while in its employment and refused him any further surgical or medical care, plaintiff thereupon became entitled to leave defendant's premises and to control his own movements, and defendant could not thereafter require him to return for any purposes. This would be equally true if he left defendant's premises on defendant's order."

XXV.

The Court erred in giving Instruction No. 14 as given by the Court to which defendant duly excepted and its exception was allowed (R. pp. 315-316) (R. p. 324):

“The Court will now direct your attention to the second cause of action set forth in plaintiff’s complaint. This cause of action is separate and distinct from plaintiff’s first cause of action and must be so considered by you. In brief, plaintiff alleges that by virtue of an arrangement existing between the defendant and plaintiff, the sum of \$1.50 per month was deducted from the wages of plaintiff, entitling him to care in a hospital and to competent surgical and medical attendance at the expense of defendant, in case of his injury or illness arising in the course of his employment; that he was injured as set forth in his first cause of action; that when discharged from defendant’s hospital, his physical condition was greatly impaired beyond the normal result of his original injury and this on account of the gross and wilful negligence of the defendant to furnish him the competent surgical and medical attendance to which he was entitled as aforesaid; that because of defendant’s refusal and neglect to furnish him timely and sufficient care and medical and hospital service, which aggravated the result of his original injury as aforesaid, and his permanent disability and the unnecessary physical and mental suffering he has undergone he has been damaged \$15,000; that he has suffered great physical pain and mental torture and still suffers some pain, other than what would naturally have resulted from his original injury, on account of defendant’s refusal and failure to give him competent surgical and medical attendance to which he was entitled.

XXVI.

The Court erred in giving Instruction No. 16 as given by the Court to which plaintiff in error duly excepted and its exception was allowed (R. p. 316), (R. p. 324) :

“You are instructed that the arrangement whereby defendant deducted \$1.50 per month from plaintiff’s wages for hospital purposes as set forth in the pleadings herein was, if not repudiated by plaintiff, in effect a contract binding the defendant at defendant’s expense, free of charge, for any injury or illness arising in the course of his employment with defendant, providing that in the event of no specific agreement to the contrary, defendant would not be required to make unusual or unnecessary expenditures but only such as the requirements of the case in the opinion of competent physicians justly demanded.”

XXVII.

The Court erred in giving instruction No. 17 as given by the Court, to which plaintiff in error duly excepted and its exception was allowed, as follows (R. p. 317) (R. p. 324) :

“The parties being brought into this relation above described the plaintiff may maintain an action for the breach of the implied obligation caused by unskilful, negligent or improper treatment on the part of the defendant, which action is known in law as a tort, and if the plaintiff proves the allegations of his second cause of action by a fair preponderance of the evidence he is entitled to recover damages caused by the unnecessary physical pain, mental suffering

and physical disability suffered by him through defendant's negligence or malpractice."

XXVIII.

The Court erred in giving the following instruction to which plaintiff in error duly excepted and its exception was allowed (R. p. 317) (R. p. 325).

"You are instructed that if you find from the evidence that the ordinary, natural results of plaintiff's original injury were aggravated by the failure and refusal of defendant to give him competent surgical and medical care, then your verdict must be for plaintiff under the second cause of action, and you will then fix his damages at such sum as will reasonably compensate him for impairment of his earning power, if you find his earning power has been impaired by the cause mentioned, and physical and mental suffering to which he has been subjected, if any, due to that cause.

If you find that plaintiff has suffered either temporary or permanent impairment of his earning power, either partial or total, because of the failure and refusal of the defendant to give him competent surgical and medical care after his original injury, he will be entitled to recover damages under his second cause of action, which you will fix according to your estimate of the sum that will compensate him for such impairment."

XXIX.

The Court erred in refusing to give the following instruction to which plaintiff in error duly excepted and its exception was allowed (R. 325):

“I instruct you that under the compensation act, under which plaintiff’s first cause of action is brought, an injured employee during the continuance of his disability, if requested by his employer, must submit himself to an examination by a physician or surgeon authorized to practice medicine under the laws of the Territory of Alaska, furnished and paid for by the employer. If any employee refuse to submit himself to such examination his right of compensation shall be suspended during such period of refusal; and I further instruct you that the defendant company had a lawful right to request said plaintiff to submit to said examination at Ellamar, Alaska, and if you find from the testimony that the defendant company did request the plaintiff to submit to such an examination, he is not entitled to compensation and you should consider this instruction in considering your answer to question No. 2 herewith submitted.”

XXX.

The Court erred in refusing to give the following instruction to which plaintiff in error duly excepted and its exception was allowed (R. 326-327) :

“I instruct you that under the hospital contract alleged in the pleadings, the defendant was not bound to furnish plaintiff the services of a specialist in surgery and if the plaintiff was dissatisfied with the treatment he received in the defendant’s temporary hospital at Ellamar or was dissatisfied with the opinion given by Doctor Duckwall as to the condition of his right clavicle on or about the 10th day of Febru-

ary, 1916, then it was the plaintiff's duty to make his dissatisfaction known to the defendant and demand further medical or surgical aid; and unless you find by a preponderance of the evidence that the plaintiff did demand of the defendant, or its officers, further medical or surgical aid and the defendant refused to give it, then you must find for the defendant and against the plaintiff."

XXXI.

The Court erred in refusing to give the following instruction to which plaintiff in error duly excepted and its exception was allowed (R. p. 327):

"I instruct you that the plaintiff, in his second cause of action, cannot recover against the defendant on account of insufficient surgical care and medical and hospital services, which may have aggravated his original injury, for the reason that he has been fully compensated for such injuries in his first cause of action; therefore you cannot find in favor of the plaintiff and against the defendant in any such manner whatever on this account."

XXXII.

The Court erred in refusing to give the following instruction to which plaintiff in error duly excepted and its exception was allowed (R. p. 328):

"I instruct you that even if the defendant failed to furnish the plaintiff with timely and sufficient surgical care and medical and hospital services, that it was the duty of the plaintiff to seek surgical aid and medical care, from others, with a view of reducing his alleged claim for damages and if you find from the

evidence that the plaintiff had an opportunity to but failed to do so, then I instruct you that the plaintiff cannot recover any sum whatever against the defendant on account of his alleged permanent disability and his physical and mental suffering subsequent to the date that he had an opportunity to secure such other surgical and medical care.”

XXXIII.

The Court erred in refusing to give the following instruction to which plaintiff in error duly excepted and its exception was allowed (R. pp. 328-329) :

“I instruct you that plaintiff in his first cause of action seeks to recover compensation for injuries he received in the course of his employment in defendant’s mine at Ellamar, Alaska, on the 12th day of January, 1916, and in his second cause of action he seeks to recover damages for the aggravation of said injuries and for mental and physical suffering alleged to have been undergone by reason of defendant’s neglect to furnish him timely and sufficient surgical care and medical and hospital care; therefore, I further instruct you before you can find for the plaintiff on his second cause of action, you must be able to determine with reasonable certainty, the amount his original injury has been aggravated and the amount of physical and mental suffering he underwent by reason of the said neglect on the part of said defendant, as separate and apart from the mental and physical suffering he underwent as the natural result of the original injury, and unless you can find this by a preponderance of evidence, you must find for the defen-

dant and against the plaintiff on plaintiff's second cause of action."

XXXIV.

The Court erred in refusing to give the following instruction to which plaintiff in error duly excepted and which exception was allowed (R. 329-330):

"I instruct you that from the evidence offered it is impossible to determine with any degree of certainty the amount of physical and mental suffering the plaintiff has undergone by reason of the alleged neglect and refusal of defendant to furnish plaintiff with sufficient surgical care and medical and hospital services, from the physical and mental suffering which would be the natural result of the original injury, therefore any verdict which you might return for plaintiff on his second cause of action would be purely speculative and this the law does not allow; I therefore instruct you that you must find for the defendant and against the plaintiff on plaintiff's second cause of action."

XXXV.

The Court erred in refusing to give the following instruction to which plaintiff in error duly excepted and which exception was allowed (R. pp. 330-331):

"I instruct you that if you believe from the evidence that Doctor Duckwall was a physician and surgeon authorized to practice medicine under the laws of the Territory of Alaska, at the time he made the examination of the plaintiff on the 10th day of February, 1916, and after making said examination, he

notified the plaintiff and the defendant that the plaintiff then and there made no protest to the opinion expressed by Doctor Duckwall, and if the plaintiff, after consulting other physicians, was advised that he was still suffering from said injuries, it was the plaintiff's duty to immediately notify said defendant of this fact and to demand of defendant such other and further surgical care and hospital and medical treatment as he might need, before he could hold the defendant liable for failure on its part to perform its part of the hospital contract, and unless you find from the evidence that the plaintiff did make such demand on the defendant and the defendant refused to comply with such demand, then you must find for the defendant and against the plaintiff.

If you further believe from the evidence that as soon as the defendant company learned that the plaintiff claimed to be suffering from said injury, after he had left Ellamar, the defendant company in good faith offered to give him surgical care and medical and hospital services and that the plaintiff refused to accept the same, then I instruct you, that the defendant company did all that was required of it under the hospital contract with plaintiff, and you must find for the defendant and against the plaintiff."

XXXVI.

The Court erred in refusing to submit to the jury the following Form of Verdict to which plaintiff in error duly excepted which exception was allowed (R. p. 333):

“We, the jury sworn and empanelled to try the above entitled cause find for the defendant and against the plaintiff on plaintiff’s second cause of action set forth in his third amended complaint.”

XXXVII.

The Court erred in denying defendant’s motion for judgment in favor of defendant notwithstanding the Verdict to which defendant duly excepted and which exception was allowed (R. pp. 339, 340, 341) :

XXXVIII.

The court erred in denying the motion of defendant for a new trial herein and its order and judgment overruling said motion and granting judgment in favor of plaintiff and against defendant for the amount of the verdict found by the jury in favor of plaintiff with costs ; which order and judgment were duly excepted to by the defendant and exception allowed by the Court. Said motion was based on all the files and proceedings herein and was made up on the following grounds specified therein and on each thereof to-wit (R. pp. 342 to 354) :

Now comes the above-named defendant and moves this Honorable Court for an order setting aside the verdict and special findings found and returned by the jury, in said cause, on the 7th day of January, 1917, and granting defendant a new trial of said cause on the following grounds :

(a) That the damages allowed by the jury were excessive and were given under the influence of passion and prejudice.

(b) That there was insufficiency of the evidence

to justify the verdict and that the same is against the law.

(c) Errors in law committed by the Court at the trial of this action and excepted to by the party making the application.

(d) For the reason that the Court erred in submitting certain instructions to the jury and in refusing to submit other instructions to the jury which were asked to be given by the defendant and for the further reason that the Court allowed the two causes of action to be united.

XXXIX.

The Court erred in making and entering its final judgment in this case, to which plaintiff in error duly excepted and which exception was allowed, for the following reasons (R. pp. 356-357) :

(a) That said judgment is against law and contrary to law and is not supported by the facts as shown by the evidence, and not justified by the evidence.

(b) That there is not sufficient evidence to support the same and especially for the reason that it is nowhere shown by the evidence that plaintiff was permanently disabled, either partially or totally, and it was nowhere shown by the evidence that plaintiff received a broken clavicle in the accident he sustained while working for the defendant company.

(c) That the entering of said judgment on plaintiff's second cause of action, for the sum of One Dollar was error for the reason that said second cause of action was a common law action and could not be joined with the first cause of action which was a special statutory proceeding and further it was error to

enter judgment on plaintiff's second cause of action because said second cause of action was an action *ex contractu* and the said first cause of action was an action *ex delicto* and could not be joined.

ARGUMENT.

IF THE PLAINTIFF IS ENTITLED TO ANY COMPENSATION OR DAMAGES FOR HIS INJURY, HE MUST SEEK THE SAME UNDER THE WORKMEN'S COMPENSATION ACT ALONE.

Plaintiff's first cause of action is brought under the provisions of Chapter 71 of the Session Laws of Alaska, 1915, commonly known as the Workmen's Compensation Act. It provides that the employer "shall be liable to pay compensation, in accordance with the schedule herein adopted, to each of his, her, their or its employees who receives *a personal injury by accident arising out of or in the course of his or her employment.*" etc. (Sec. 1). This act then gives a schedule of compensation covering all ordinary and usual injuries arising from accidents in mines, resulting either in temporary or permanent disability, and covering both partial and total disability. As to partial disability it provides:

"Whenever such employe receives an injury arising out of and in the course of employment, as a result of which he or she is partially disabled, and the disability so received is such as not to come wholly within any of the specific cases for which provision is herein made, such employee shall be entitled to receive as compensation a sum

which bears the same relation to the amount he or she would be entitled to receive hereunder if he or she were totally and permanently disabled, that the loss of earning capacity of such employee, by reason of the accident, bears to the earning capacity such employee would have had had he or she not been injured, the amount to be paid in no case to exceed four thousand eight hundred dollars (\$4,800.00).”

(Session Laws Alaska, 1915, pp. 151-152).

Section 7 of the Act (page 153), provides:

“The right to compensation for an injury and the remedy therefor granted by this act shall be in lieu of all rights and remedies as to such injury now existing at common law or otherwise, and no rights or remedies, except those provided for by this act, shall accrue to employees entitled to compensation under this act while it is in effect; nor shall any right or remedy, except those provided for by this act, accrue to the personal or legal representative, dependents, beneficiaries under this act, or next of kin of such employee.”

The case was tried on the theory that this act governed as to plaintiff's first cause of action, but the second cause of action was, we contend, *ex contractu*. The plaintiff was permitted to give in evidence without objection the facts concerning his alleged injuries and the extent thereof. For the purpose of determining the extent of such injuries so received, if any, the testimony of the surgeon was also doubtless competent. It was incumbent on the plaintiff to show whether the injuries were permanent or only temporary in character, and whether the same were partial or total. It was also necessary to show that such in-

juries were sustained "by accident arising out of and in the course of his employment." But testimony tending to prove anything else, such as the offer on the part of plaintiff that his injuries were caused by a defective brake (R. pp. 66-67), was clearly incompetent and was so held by the trial Court in that instance.

However, on the theory that it was proper and competent testimony as to the matters alleged in plaintiff's second cause of action, the trial Court permitted plaintiff to give his testimony that Estey, an officer of the defendant, requested plaintiff to sign a paper promising to give plaintiff half pay if he signed and threatening to throw him out the next day if he did not sign) (R. p. 76), that Gedney, the foreman for the defendant, ordered him out of the hospital (R. p. 78) and called him a "Bohunk son of a bitch," and told him to get out (R. p. 112). Now we submit that as to the first cause of action all of this was clearly incompetent and irrelevant, and indeed plaintiff's counsel introduced it as bearing on the second cause of action and not on the first cause of action set out in plaintiff's complaint. It is likewise clear that as to the first cause of action standing alone such testimony was highly prejudicial to the substantial rights of the defendant as it tended to bias and prejudice the jury against the defendant. That is the great vice of permitting the two causes of action to be joined; it permits the plaintiff, under the guise of introducing evidence to support a second cause of action, to get before the jury al-

leged declarations and actions of the defendant highly damaging and prejudicial and tending to bias the jury against the defendant upon the count under the compensation act.

Now, let us see whether, as we contend, the plaintiff, under the evidence as presented by the record, is entitled to compensation on his first cause of action alone. The Act recites that employees are entitled to compensation for personal injuries sustained

“by accident arising out of or in the course of his or her employment.”

It further provides that such compensation shall be in lieu of all rights and remedies at common law or otherwise. It further contains the significant provision that:

“If an injured employee entitled to compensation hereunder shall be paid compensation under any sub-division or part of this schedule, and it shall afterwards develop that he or she was entitled to a higher rate of compensation under some other part or subdivision of this schedule, then and in that event he or she shall receive such higher rate, after first deducting the amount that has already been paid him or her.”

The precise question here raised was before the Court in the case of *Ross v. Erickson Construction Co., et al.*, 155 Pac. 154, where, under a different and more elaborate statute it is true, upon the plaintiff's joinder of two pleas as in the case at bar, one under the compensation act of the state of Washington, and one at common law for the negligence of the defendant in furnishing the plaintiff with the services of a

competent physician and surgeon, the Court held that the defendant was relegated to the compensation act alone. In the course of its opinion the court reviewed the law on the subject and cited a number of cases in point:

“In *Gregutis v. Waclark Wire Works*, 86 N. J. Law, 610, 92 Atl. 355, it was sought to maintain an action under what was there known as the ‘Death Act.’ Laws 1848, p. 151; Comp. Laws 1910, p. 1907. It is an act like section 183, Rem. & Bal. Code, giving a right of action for the wrongful death of a person. The Court sustained a demurrer upon the ground that the Workmen’s Compensation Act had provided an exclusive remedy.

The Court said:

‘Since that act (the Death Act) limited the relief granted thereby to recovery in cases where the decedent would, if death had not ensued, have been entitled to maintain an action, we must now consider whether the plaintiff’s intestate, if living, could have maintained an action.’

After due consideration and discussion, the Workmen’s Compensation Act was held to be exclusive; the conclusion of the Court being:

‘It will be observed that the Workingmen’s Compensation Act deals with cases where the injury results in death, and paragraph 8 provides that, where the contract of hiring is subject to section 2 of the act, such agreement shall be a surrender by the parties thereto of their rights to any other method, form, or amount of compensation or determination thereof

than as provided in section 2. Obviously the remedy thereby provided in case of death, where the contract of the employe is subject to section 2, is inconsistent with the remedy provided by the Death Act, because the latter provides for a different procedure and a different rule of damages. Since the Workmen's Compensation Act by its terms repeals all inconsistent legislation, the rights and remedies thereby given are substituted for those theretofore provided by the Death Act.'

In *Re Brightman*, 220 Mass. 17, 107 N. E. 527, it was held that where an employe had over-exerted himself in saving his effects from a barge, which was on fire, thus aggravating a heart disease with fatal results, an award would be upheld. The Court evidently considered and rejected the doctrine of intervening agency and aggravation independent of a primary wrong, and looked only to the purpose of the law:

'In the case at bar there may be found to be apparent to the rational mind a causal connection between the employment and the thing done by the employe at the time of the sinking of the lighter. * * * Acceleration of previously existing heart disease to a mortal end and sooner than otherwise it would have come is an injury within the meaning of the Workmen's Compensation Act.'

So in *Re Sponatski*, 220 Mass. 526, 108 N. E. 466, a workman had been hurt by a splash of molten metal striking him in the eye. While insane as a result of the pain suffered by reason of the injury he threw

himself from a window and was fatally injured. It was held that his widow was entitled to an award; that it was immaterial whether the death was or was not a reasonable and likely consequence—the injury relating solely to the chain of physical causation between the injury and the death. We think the importance of the inquiry warrants us in reproducing the holding of the Court:

‘It is of no significance whether the precise physical harm was the natural and probable, or the abnormal and inconceivable, consequence of the employment. The single inquiry is whether in truth it did arise out of and in the course of that employment. If death ensues, it is immaterial whether that was the reasonable and likely consequence or not; the only question is whether in fact ‘death results from the injury.’ * * * When that is established as the cause, then the right to compensation is made out. If the connection between the injury as the cause and the death as the effect is proven, then the dependents are entitled to recover, even though such a result before that time may never have been heard of and might have seemed impossible. The inquiry relates solely to the chain of causation between the injury and the death.’

In *Burns’ Case*, 218 Mass. 8, 105 N. E. 601, the immediate cause of death was bed sores which finally produced blood poisoning. A finding that death resulted from the injury was upheld. The Court quoted from *McDonald v. Snelling*, 14 Allen (Mass.) 290, 92 Am. Dec. 768:

‘The mere circumstance that there have intervened, between the wrongful cause and the injurious consequence, acts produced by the volition of animals or of human beings, does not necessarily make the result so remote that no action can be maintained. The test is to be found, not in the number of intervening events or agents, but in their character, and in the natural and probable connection between the wrong done and the injurious consequence. So long as it affirmatively appears that the mischief is attributable to the negligence as a result which might reasonably have been foreseen as probable, the legal liability continues.’ Nor would it have been material, if that had been found to be the fact, that the bed sore was due to the mistake or the negligence of the physicians acting honestly.’

An award was upheld in *Beable v. Milton*, 5 W. C. C. (Eng.) 55. It was there complained that the workman had been the victim of malpractice. Although it was found that the treatment was not defective, it was said:

‘Assuming it to have been defective, I hold that it would have been no defense to this application, inasmuch as the applicant had done all he could in going to the hospital and submitting to the treatment administered there, independently of his having gone there at the desire and with the privity and consent of the respondents.’

In *Smith v. Northern Pac. R. Co.* 79 Wash. 453, 140 Pac. 687 the law is broadly stated to be:

‘If a person receives an injury through the

negligent act of another, and the injury is afterwards aggravated, and a recovery retarded through some accident not the result of want of ordinary care on the part of the injured person, he may recover for the entire injury sustained, as the law regards the probability of such aggravation as a sequence and natural result likely to flow from the original injury.'

In *Brown v. Kent*, 6 Butterworth's W. C. C. 745, a workman who had been injured in the knee, necessitating an operation, was stricken with scarlet fever contracted in the hospital. The contracted disease settled in the knee joint, making an injury, that otherwise would have been of no consequence, a permanent disability. It was held that the workman was entitled to compensation. The judges quoted from *Dunham v. Clare*, 2 K. B. 292, 4 W. C. C. 102, as follows:

'The question whether death resulted from the injury resolves itself into an inquiry into the chain of causation. If the chain of causation is broken by a *novus actus interveniens*, so that the old cause goes and a new one is substituted for it, that is a new act, which gives a fresh origin to the after consequences.'

And thus observed:

'It may well be that the fever, and the condition of the patient caused by it, much increased the risk of the formation of pus; but it was the old wound which was giving the trouble—the old wound which suppurated. It was the evidence of Dr. Bone, accepted and agreed to by both parties, that if there had not been any accident, and consequent injury to the knee, the

scarlet fever could not have caused the injury or the incapacity in question. 'The result is necessarily that the incapacity is the result of the accident to the knee, although probably aggravated by the scarlet fever. This entitled the workman to compensation for the accident on the footing that the incapacity caused by it is continuing.' "

We submit that under the evidence in the case at bar the case of *Ross vs. Erickson Construction Co.*, above cited, is controlling; for as we view the evidence there is none from which the court or jury could determine what part of the plaintiff's injuries, if any, was attributable to the original injury, and what part was attributable to the treatment or, rather, lack of treatment he received from a physician. Indeed, the record is singularly bare of any direct or oblique statement from any witness that any part or proportion of plaintiff's alleged injuries arise from improper medical treatment subsequent to his injuries. And it was therefor manifest error to permit the plaintiff, under the theory of offering it in support of his second cause of action, to offer testimony so prejudicial to the plaintiff as that hereinbefore referred to. This question is raised upon the record by the following Assignments of Error: i to xiii inclusive, xv to xxi inclusive, xxv to xxix inclusive, xxxi, xxxiii, to xxxiv inclusive, xxxvi, xxxvii and xxxix.

THIS JOINDER OF ACTIONS CANNOT BE MAINTAINED.

We contend that the joinder of these two causes of action cannot be maintained. The action against

this defendant must be based either upon the "Workmen's Compensation Act" as passed by the Alaska Legislature in 1915, or common law. It cannot be maintained against the defendant based upon both the statute and common law, especially where a specific proceeding is provided by statute.

In the case of *McHugh v. St. Louis Transit Co.*, 88 S. W. 853, the Court said:

"An action for damages at common law for negligence cannot be joined to one for statutory negligence"

and again in *Abernathy v. South & W. Ry. Co.*, 63 S. E. 180:

"A proceeding being purely statutory, a cause of action for compensation and one for damages cannot be joined."

Plaintiff's first cause of action as set forth in his third amended complaint is a special statutory proceeding, that is, a proceeding to recover compensation for an injured employee under the provisions of Chapter 71 of the Session Laws of the Territory of Alaska, for the year 1915, hereinbefore quoted.

This Act provides a special measure of damages to be ascertained by special rules and procedure and cannot be joined with a common law action as pleaded in plaintiff's second cause of action, for the reason that the measure of damages and the rules of procedure governing the trial of said second cause of action are entirely different from that of the said first cause of action.

Plaintiff in his first cause of action seeks to obtain compensation for his present permanent partial

disability under the provisions of Chapter 71, as aforesaid, of which the accident occurring in the defendant's mine on the 12th day of January, 1916, was the proximate cause and he cannot join with such an action his second cause of action in which he seeks to recover damages for a portion of his present alleged injuries, for the reason that his entire injuries growing out of said accident and of which said accident is the proximate cause will be fully compensated in his first cause of action.

Any evidence offered under the second cause of action and not in support of the first cause of action, tended to bias and prejudice the jury against the defendant; as is shown by the verdict of the jury in awarding plaintiff a greater amount of compensation under his first cause of action than was asked for in his third amended complaint (R. p. 338).

These two causes of action cannot be joined because the first cause of action as set forth in plaintiff's third amended complaint is an action *ex delicto* and the second cause of action as set forth in said complaint is an action *ex contractu*; the first cause of action having for its foundation an alleged tort of the defendant and the second cause of action having for its foundation an alleged breach of a hospital contract.

That the first cause of action is an action *ex delicto* needs no argument. The second cause of action is undoubtedly an action *ex contractu* for the reason that the said second cause of action could not have been proved without evidence showing a contract between

the plaintiff and defendant and the mere fact that defendant deducted from plaintiff's wages the sum of \$1.50 a month for hospital dues clearly shows a contract between plaintiff and defendant whereby defendant would be required to give plaintiff reasonable medical care and attention. Where an action is not maintainable without pleading and proving a contract—where the gist of the action is the breach of the contract, either by malfeasance or nonfeasance, it is, in substance, whatever may be the form of the pleading, an action on the contract.

1 Chit. Pl. 87; Pom. Rem. 334;

1 Lindley on Partnership 482;

Chadburn v. Rahilly, 25 N. W. 632;

141 N. W. 181;

L. R. A. 1914 C. 720.

The plaintiff not only alleged a contract in his pleading but he also introduced evidence showing that the defendant company did deduct a certain amount (\$1.50 each month) out of plaintiff's wages for hospital services, medical and surgical attendance; and it was admitted by defendant that such was the case and that all injured persons were given first aid at the temporary hospital at Ellamar, Alaska, and then, if the injury was considered serious, the injured one was taken to some doctor (R. pp. 184-185-186), showing conclusively that the second cause of action is an action *ex contractu*.

We believe that it needs no further argument to show that the second cause of action set out in said complaint is an action *ex contractu* and

if this be true then the complaint does join a cause of action *ex delicto* and a cause of action *ex contractu* and it will only require the following citations to sustain our contention that the two causes of action are improperly united.

Stark v. Wellman, 31 Pac. 260;

Clark v. Great Northern Ry., 72 Pac. 477;

T. M. Loop et al. v. California So. Railroad,
63 Cal. 97; 46 Federal 735.

Boylan v. Hot Springs R. R. Co., 132 U. S.
148, 33 L. Ed. 290;

In *Sanders v. Stimson Mill Company*, 73 Pacific 688 and reported on rehearing in 75 Pac. 974, the learned Judge said:

“An action in tort for injuries to a seaman cannot be jointed with an action on contract to furnish the seaman medical care, nursing and attendance at the expense of the ship on which he was injured.”

This case is very similar to the one under consideration as in that case the plaintiff set out a cause of action for the refusal of the defendant to furnish medical care, nursing, etc., and also a cause of action for the original injury, which was a gun shot wound, and the Court held that the cause of action for medical attendance, etc., was one on contract and not on tort.

Plaintiff does not come within the rule whereby he can waive his contract and sue in tort because the allegations of his second cause of action nowhere allege *malfeasance* on the part of the defendant in connection with said hospital contract but does allege

nonfeasance or failure on the part of the defendant to perform its part of said contract.

12 L. R. A. 929 Note.

The Compiled Laws of Alaska do not permit the joinder of these two causes of action because Section 916, Page 403 states;

“The plaintiff may unite several causes of action in the same complaint when they all arise out of—

First: Contract, express or implied; or

Second: Injuries, with or without force to the person.”

No interpretation can be placed on these two subdivisions construing them as allowing the joinder of a cause of action on contract with one for injuries to the person, especially considering the following limitation under Sec. 916.

“But the causes of action so united must all belong to one only of these classes,” etc.

In *Clark v. Great Northern Ry. Company*, in considering this question (72 Pac. 479) the learned Judge said:

“It merely authorizes the joinder of causes of like character; that is, any number of causes upon contract may be united in one complaint when the parties and the places of trial are the same. So also any number of causes of action for injuries with or without force, where the parties and places of trial are the same, may be united in one complaint. But actions on contract cannot be united with actions in tort.”

Also in 183 S. W. 940, *Foy-Proctor Company v. Marshall & Thorn*, the Court said:

“Under Civ. Code Prac. touching the joinder of causes of action, the joinder of a cause of action in tort with one in contract is improper” and again in 184 S. W. 873, *Little v. Consolidation Coal Co.*:

“Civil Code practice providing for the joinder of actions on contract growing out of the same transaction, does not authorize the joinder of actions on contract and tort.”

Further these two causes of action cannot be joined because they do not admit of the same judgment.

2 Am. Dec. 109; 58 Atl. 30;
66 L. R. A. 478; 21 So. 59.

The foregoing objections and exceptions are raised on the Record by Assignments of Error: i, viii to xiii inclusive, xv, xvii to xxi inclusive, xxv to xxviii inclusive, xxxi, xxxiii, xxxiv, xxxvi, xxxvii, xxxiii and xxxix (R. pp. 363 to 400).

From the foregoing authorities and a plain reading of the “Workmen’s Compensation Act” the plaintiff in this action should not be allowed to maintain these two causes of action in the same suit if for no other reason than that if he were allowed to do this he could be compensated twice for the same injury, and this the law does not allow.

This compensation act specifically repeals all actions or cause of actions which an injured person, coming within the terms of said Act, might or could have under the common law for personal injuries and it seems that this statute alone is sufficient to dispel any doubt as to whether these two causes of action

can be joined.

Session Laws of Alaska, 1915, p. 153.

To permit the joinder of these two causes of action would be to permit the plaintiff to be compensated for his injuries under the compensation act, and also be compensated for the same identical injuries under the common law provisions which were specifically repealed by the compensation act.

**THERE IS NO EVIDENCE SUFFICIENT TO
SUSTAIN THE JUDGMENT ENTERED ON
PLAINTIFF'S FIRST CAUSE OF ACTION.**

There was no evidence introduced by plaintiff which would sustain his first cause of action. A careful reading of all the evidence of plaintiff will disclose that he has nowhere shown that he received a broken clavicle in the accident complained of and there was no evidence showing that plaintiff's right arm was permanently disabled except possibly the testimony of Doctor Boyle and he did not state the fact positively, his testimony (R. p. 122) on this point being:

“Q. Can you form any reasonable estimate as to the length of time that condition has existed?

A. Well, I cannot—it might have existed six months or several years—I couldn't state with any degree of accuracy the exact length of time the condition has existed.”

The testimony of Doctor Duckwall, contained in his deposition clearly contradicts any testimony that was offered as to this plaintiff's clavicle having been

broken in the accident while he was in the employ of defendant and Doctor Duckwall was the first doctor to examine plaintiff after the accident. Doctor Duckwall's deposition (R. pp. 223 and 224) is as follows:

"From said examination I am positive that, at that time (February 10, 1916), the said plaintiff did not have a fracture of his right clavicle and that his right clavicle was entirely normal and that no bones thereof were dislocated; and that said plaintiff's right shoulder was, at that time, in its normal condition and there was no reason why plaintiff could not use his right arm and right shoulder to its full normal strength."

The only evidence introduced by plaintiff tending to show that plaintiff's right arm was permanently partially disabled was the evidence of plaintiff and Doctor Boyle and he, (Doctor Boyle) did not give direct and positive answers to the questions asked him in this regard (R. pp. 134-136).

"Q. Now why or on what do you base your opinion that this plaintiff is at this time suffering from a disability by reason of a fracture he did have in his right clavicle"?

A. I have made several examinations of the plaintiff and I have satisfied myself from manipulating his shoulder and observing the man and studying the case that there is some impairment there of the function of that shoulder.

Q. Now, from your scientific knowledge and surgical knowledge, what is the reason that the use of that shoulder is now impaired?

A. I cannot find any abnormality other than the shortening of that clavicle.

Q. Would the shortening of the clavicle

necessarily cause any impairment of the shoulder?

A. In some instances it does and in some it does not.

Q. You cannot assign any physical reason why it should, can you?

A. No."

And again we have (R. p. 149):

"Q. Can you at this time state a specific case where the clavicle was broken and in the union there was an overlapping that caused the patient to lose the use of his arm?

A. I cannot recall a case of mine of that kind, no.

Q. Nothing of that kind has come under your observation?

A. No."

The testimony of Doctor Gross in regard to the permanent partial disability of plaintiff's right arm was clearly contradictory to the testimony of Doctor Boyle (R. p. 242):

"Q. Now, after your physical examination of the plaintiff and your X-Ray examination of the plaintiff on September 5, 1916, what is your opinion of the condition of this plaintiff as to whether the plaintiff is permanently injured in his right shoulder or right clavicle at this time, or at the time you made the examination?

A. My opinion is that he was not.

Q. Is there anything that would cause him any disability in the use of his right arm or right shoulder by reason of the enlargement which you discovered upon his right clavicle?

A. I see no reason whatever for a disability."

And again the testimony of Doctor Newlove (R. pp. 286-287) :

“Q. From your examination of the plaintiff, did you discover any defect in his right clavicle or right shoulder that would, in your opinion, permanently disable him?

A. In my opinion, no.

Q. What is your opinion, from your examination, as to the plaintiff's ability at this time to use his arm freely as an arm is ordinarily used, or an ordinary arm is used?

A. Well, I think the man could use it if he tried.”

The foregoing contention, as to insufficiency of the evidence to justify a verdict on plaintiff's first cause of action, is raised on the record by Assignment of Errors: xxi, xxxvii, xxxviii and xxxix (R. pp. 381-2-3-4-400).

THERE IS NO EVIDENCE SUFFICIENT TO SUSTAIN THE JUDGMENT FOR THE PLAINTIFF ON HIS SECOND CAUSE OF ACTION.

The evidence introduced by plaintiff does not sustain his second cause of action for the reason that it does not show that he was not given proper medical care and attention but on the contrary all of the evidence shows that he was given the proper care and treatment and that even had his clavicle been broken the result obtained was an average result and one which a competent physician would be satisfied with in a similar case. We find the following testi-

mony of Dr. Gross (R. p. 249) :

“Q. What is your opinion—in case there was at one time a fracture of the plaintiff’s right clavicle, which caused separation—what is your opinion as to whether the union of that bone is good or bad ?

A. My opinion is that the union is good.

Q. What would you say, from your experience in treating cases of a fractured clavicle, whether or not the union as you found it from your various examinations, was as good as is ordinarily obtained in such cases ?

A. I would say it is as good.”

And again (R. p. 283) we have the following from the testimony of Dr. Newlove :

“Q. And from the condition you found there, what would you say in your opinion as to whether the plaintiff had received good care shortly after the accident that caused that fracture or otherwise ?

A. Well, from the result, I should say that he received very good care.

Q. Comparing the condition of this clavicle of the plaintiff at the point of original fracture, if there was a fracture, what would you say as to the condition you there found, as to whether it was an average good union or otherwise ?

A. I should say it was an average good union.

Q. Did you detect anything in connection with the union of this clavicle that would lead you to believe that there had been surgical neglect at the time the fracture occurred ?

A. Well, from present appearances, it looks to me like a very satisfactory result.”

It appears from the defendant's evidence that on or about the 20th day of February, 1916, the defendant established at Ellamar a complete hospital equipped with all modern surgical appliances including an X-ray and employed a competent and experienced physician and surgeon (R. pp. 185-186-229), who examined plaintiff and found that the shoulder was bruised but the examination did not disclose that plaintiff's clavicle was broken or that he could not use his right arm and shoulder, but that the muscles around the shoulder were sore and naturally caused the right arm to feel painful, but by massaging the muscles around the right shoulder the pain would be reduced if not entirely eliminated; but the plaintiff refused to have this done and at that time did not state that his clavicle was broken or that any bones were broken or that there was any other pain and that plaintiff went thru some exercises in the presence of the doctor that would have disclosed if any bones had been broken (R. pp. 232-250).

We believe the foregoing evidence shows conclusively that plaintiff received the best kind of treatment and such treatment that any competent physician and surgeon would have given him under like circumstances and even had his clavicle been broken that the result of the treatment given him was an average result.

We therefore believe that the evidence offered by plaintiff was insufficient to justify a verdict for the plaintiff on either of his causes of action.

ERRORS IN INSTRUCTIONS GIVEN AND REFUSED.

Errors are assigned to the giving of certain instructions, and to the refusal to give certain instructions requested by defendant.

The Court instructed the jury as follows:

“You are instructed that if the defendant in this case denied the existence of injuries or disability suffered by plaintiff while in its employment and refused any further surgical or medical care, plaintiff thereupon became entitled to leave defendant’s premises and to control his own movements, and defendant could not thereafter require him to return for any purposes. This would be equally true if he left defendant’s premises on defendant’s order” (R. p. 313) (Exception R. 323).

This instruction was clearly erroneous because it assumes a fact not testified to in the case; there being no testimony of the plaintiff’s injury having ever been denied by defendant or that plaintiff ever denied or refused the plaintiff further surgical aid and care; and, further, that said instruction does not state the law governing plaintiff’s second cause of action and covers ground entirely foreign to this cause of action and has no bearings or relation whatever to plaintiff’s first cause of action.

The objection to this instruction is raised upon the record by Assignment of Errors xxiv (R. p. 389).

The Court further instructed the jury as follows:

“The Court will now direct your attention to the second cause of action set forth in plaintiff’s complaint. This cause of action is separate

and district from plaintiff's first cause of action and must be so considered by you. In brief, plaintiff alleges that by virtue of an agreement existing between the defendant and plaintiff, the sum of \$1.50 per month was deducted from the wages of plaintiff, entitling him to care in a hospital and to competent surgical and medical attendance at the expense of defendant, in case of his injury or illness arising in the course of his employment; that he was injured as set forth in his first cause of action; that upon admission and during his stay there, no competent medical and surgical attendance was given him; that when discharged from defendant's hospital, his physical condition was greatly impaired beyond the normal result of his original injury and this on account of the gross and wilful negligence of the defendant to furnish him the competent surgical and medical attendance to which he was entitled as aforesaid; that because of defendant's refusal and neglect to furnish him timely and sufficient care and medical and hospital service, which aggravated the result of his original injury as aforesaid and his permanent disability and the unnecessary physical and mental suffering he has undergone he has been damaged \$15,000; that he has suffered great physical pain and mental torture and still suffers some pain, other than would naturally have resulted from his original injury, on account of defendant's refusal and failure to give him competent surgical and medical attendance to which he was entitled" (R. 315) (Exception R. 324).

This instruction is clearly erroneous in that it does not completely state the allegations of plaintiff's

complaint as set forth in his second cause of action and does not correctly state the testimony offered in behalf of plaintiff in support of his second cause of action and has a tendency to bias and prejudice the jury against the defendant and against the substantial rights of the defendant and tends to mislead the jury in this case for the following reasons:

First: That it is so worded that it appears to instruct the jury that no competent medical and surgical attention was given plaintiff by defendant.

Second: That it appears to instruct the jury that the plaintiff's physical condition was impaired beyond the result of his original injury.

Third: It appears to instruct the jury that defendant did refuse and neglect to furnish plaintiff timely and sufficient care thus aggravating his original injury.

Fourth: It appears to instruct the jury that plaintiff has been damaged on his second cause of action to the amount of \$15,000.

The objection to this instruction is raised upon the record by Assignments of Error xxv (R. pp. 389-390).

The Court further instructed the jury as follows:

"You are instructed that the arrangement whereby defendant deducted \$1.50 per month from plaintiff's wages for hospital purposes as set forth in the pleadings herein was, if not repudiated by plaintiff, in effect a contract binding the defendant, at defendant's expense, to furnish the plaintiff competent surgical and medical attendance, free of charge, for any injury or ill-

ness arising in the course of his employment with defendant, providing that in the event of no specific agreement to the contrary, defendant would not be required to make unusual or unnecessary expenditures but only such as the requirements of the case in the opinion of competent physicians justly demanded" (R. 316) (Exception R. 324).

This instruction is clearly erroneous because it does not correctly state the law concerning the hospital contract between plaintiff and defendant as shown by the pleadings and the evidence and seems to convey the idea to the jury that the defendant under the terms of said contract was obliged to maintain at its mine a competent physician and surgeon to pass upon injuries of plaintiff at the time they occurred, all of which is prejudicial to the substantial rights of the defendant and is not the law governing the case.

The objection to this instruction is raised on the record by Assignments of Error xxvi (R. p. 391).

The Court instructed the jury as follows:

"The parties being brought into this relation above described the plaintiff may maintain an action for the breach of the implied obligation caused by unskilful, negligent or improper treatment on the part of the defendant, which action is known to the law as a tort, and if the plaintiff proves the allegations of his second cause of action by a fair preponderance of the evidence he is entitled to recover damages caused by the unnecessary physical pain, mental suffering and physical disability suffered by him through defendant's negligence or malpractice" (R. p. 317) (Exception R. p. 324).

This instruction was clearly erroneous for the reason that the same does not correctly state the law governing the case and the same is prejudicial against the substantial rights of the defendant because it does not state the evidence or allegations of the pleadings correctly in that it uses the phrase "malpractice" which does not appear in the evidence or pleadings and it authorizes the jury to find under the second cause of action for the same matters and things covered by the first cause of action. The objection to this instruction is raised upon the record by Assignment of Error xxvii (R. p. 391).

The Court further instructed the jury:

"You are instructed that if you find from the evidence that the ordinary, natural results of plaintiff's original injury were aggravated by the failure and refusal of defendant to give him competent surgical and medical care, then your verdict must be for plaintiff under the second cause of action, and you will then fix his damages at such sum as will reasonably compensate him for impairment of his earning power, if you find his earning power has been impaired by the cause mentioned, and physical and mental suffering to which he has been subjected, if any, due to that cause.

If you find that plaintiff has suffered either temporary or permanent impairment of his earning power, either partial or total, because of the failure and refusal of the defendant to give him competent surgical and medical care after his original injury, he will be entitled to recover damages under his second cause of action which you will fix according to your estimate of the

sum that will compensate him for such impairment" (R. p. 317) (Exception R. p. 325).

This instruction was erroneous for the reason that it did not correctly state the law governing plaintiff's second cause of action, in that, it instructs the jury that they may find for plaintiff on his second cause of action for the same matters and things alleged in the first cause of action for which he will be fully compensated in his first cause of action.

The objection to this instruction is raised on the record by Assignment of Error xxviii (R. 392).

The Court refused to give the following instruction to which defendant duly excepted and its exception was allowed (R. 325).

"I instruct you that under the compensation act, under which plaintiff's first cause of action is brought, an injured employee during the continuance of his disability, if requested by his employer, must submit himself to an examination by a physician or surgeon authorized to practice medicine under the laws of the Territory of Alaska, furnished and paid for by the employer. If any employee refuse to submit himself to such examination his right to compensation shall be suspended during such period of refusal; and I further instruct you that the defendant company had a lawful right to request said plaintiff to submit to said examination at Ellamar, Alaska, and if you find from the testimony that the defendant company did request the plaintiff to submit to such an examination, he is entitled to compensation and you should consider this instruction in considering your answer to question No. 2 herewith submitted."

This instruction was certainly correct for it is expressly provided by the Compensation Act that if an employee does not submit himself to an examination, when he is injured, when requested so to do by the company then his compensation for the period during which he refused to so submit shall be deducted from the amount he is entitled to (Session Laws 1915, 165) and this instruction was not covered by other instructions given by the Court and there was evidence introduced showing that plaintiff was requested to submit himself to such examination (R. pp. 181, 182) but that plaintiff refused to do so (R. p. 181).

The exception to the refusal of the Court to give this instruction is raised on the record by Assignment of Error xxix (R. p. 393).

The Court further refused to give the following instruction to which defendant duly excepted and an exception was allowed (R. p. 326).

“I instruct you that under the hospital contract alleged in the pleadings, the defendant was not bound to furnish plaintiff the services of a specialist in surgery and if the plaintiff was dissatisfied with the treatment he received in the defendant’s temporary hospital at Ellamar or was dissatisfied with the opinion given by Doctor Duckwall as to the condition of his right clavicle on or about the 10th day of February, 1916, then it was the plaintiff’s duty to make his dissatisfaction known to the defendant and demand further medical or surgical aid; and unless you find by a preponderance of the evidence that the plaintiff did demand of the defendant, or its officers,

further medical or surgical aid and the defendant refused to give it, then you must find for the defendant and against the plaintiff.”

This instruction was clearly entitled to be given to the jury as it was not covered by other instructions.

The exception to this instruction not being given is raised by Assignment of Error xxx (R. pp. 393-4).

The Court refused to give the following instruction, which was duly excepted to by defendant and exception allowed (R. p. 327).

“I instruct you that plaintiff, in his second cause of action, cannot recover against the defendant on account of insufficient surgical care and medical and hospital services, which may have aggravated his original injury, for the reason that he has been fully compensated for such injuries in his first cause of action; therefore you cannot find in favor of the plaintiff and against the defendant in any sum whatever on this account.”

This instruction was clearly correct; it was not given by the Court in other instructions, and correctly stated the law and should have been given.

The exception to the refusal of the Court to give this instruction was raised on the record by Assignment of Error xxxi (R. pp. 394-5).

The Court refused to give the following instruction requested to be given by defendant and to which defendant excepted and the exception was allowed: (R. pp. 327-8):

“I instruct you that even if the defendant failed to furnish the plaintiff with timely and sufficient surgical care and medical and hospital

services, that it was the duty of the plaintiff to seek surgical aid and medical care, from others, with a view of reducing his alleged claim for damages and if you find from the evidence that the plaintiff had an opportunity to but failed to do so, then I instruct you that the plaintiff cannot recover any sum whatever against the defendant on account of his alleged permanent disability and his physical and mental suffering subsequent to the date that he had an opportunity to secure such other surgical and medical care.”

The exception to the refusal of the Court to give this instruction is raised upon the record by Assignment of Error xxxii (R. p. 395).

The Court refused to give the following instruction which was excepted to and the exception was allowed:

“I instruct you that plaintiff in his first cause of action seeks to recover compensation for injuries he received in the course of his employment in defendant’s mine at Ellamar, Alaska, on the 12th day of January, 1916, and in his second cause of action he seeks to recover damages for the aggravation of said injuries and for mental and physical suffering alleged to have been undergone by reason of defendant’s neglect to furnish him timely and sufficient surgical care and medical and hospital care; therefore, I further instruct you before you can find for the plaintiff on his second cause of action, you must be able to determine with reasonable certainty, the amount his original injury has been aggravated and the amount of physical and mental suffering he underwent by reason of the said neglect on the part of said defendant, as separate and

apart from the mental and physical suffering he underwent as the natural result of the original injury, and unless you can find this by a preponderance of evidence you must find for the defendant and against the plaintiff on plaintiff's second cause of action" (R. pp. 328-9).

This instruction was correct in stating the law because the jury certainly could not take into consideration the amount of physical suffering the plaintiff underwent by reason of the original injury and apply it to the second cause of action; and this instruction was not covered by other instructions given by the Court. The exception to the refusal of the Court to give this instruction was raised on the record by Assignment of Error xxxiii (R. p. 396).

The Court refused to give the following instruction which was excepted to by defendant and the exception was allowed.

"I instruct you that from the evidence offered it is impossible to determine with any degree of certainty the amount of physical and mental suffering the plaintiff has underwent by reason of the alleged neglect and refusal of defendant to furnish plaintiff with sufficient surgical care and medical and hospital services, from the physical and mental suffering which would be the natural result of the original injury, therefore any verdict which you might return for plaintiff on his second cause of action would be purely speculative and this the law does not allow; I therefore instruct you that you must find for the defendant and against the plaintiff on plaintiff's second cause of action" (R. pp. 329-330).

The exception to this instruction being refused to be given to the jury is raised on the record by Assignment of Error xxxiv (R. p. 397).

The Court erred in refusing to submit the following form of Verdict to the Jury, requested to be submitted by defendant, to which refusal defendant duly excepted and the exception was allowed:

“We, the Jury sworn and empanelled to try the above entitled cause find for the defendant and against the plaintiff on plaintiff’s second cause of action set forth in his third amended complaint” (R. p. 333).

Assignment of Error xxxvi (R. p. 399).

We think each of these instructions was proper and should have been given for the reasons already stated.

For the reasons hereinbefore stated, we respectfully submit that the judgment of the trial Court should be reversed, and the action dismissed.

DONOHUE & DIMOND,
and
W. S. BONNIFELD,
Attorneys for Plaintiff in Error.

No. 2949 9

IN THE
UNITED STATES
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,
Plaintiff in Error.

vs.

TONY POSSUS,
Defendant in Error.

UPON WRIT OF ERROR TO THE DISTRICT
COURT OF THE TERRITORY
OF ALASKA, THIRD DIVISION

BRIEF OF DEFENDANT IN ERROR

JOHN LYONS,

E. E. RITCHIE,

Attorneys for Defendant in Error

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Filed

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BRIEF OF DEFENDANT IN ERROR

This brief of defendant in error will follow plaintiff in error in referring to the parties herein as in the trial court, plaintiff in error as defendant and defendant in error as plaintiff.

Defendant's brief makes thirty-nine assignments of error, suggestive of the celebrated thirty-nine articles of theology in length. Apparently impressed by the repetitions contained in these numerous assign-

ments counsel in argument have grouped their contentions into five, as follows:

1. If plaintiff is entitled to any compensation or damages for his injury he must seek the same under the workmen's compensation act alone (brief p. 41).

2. This joinder of actions cannot be maintained (p. 50).

3. There is no evidence sufficient to sustain the judgment entered on plaintiff's first cause of action (p. 57).

4. There is no evidence sufficient to sustain the judgment for plaintiff on his second cause of action (p. 60).

5. Errors in instructions given and refused (p. 63).

Answering the first of these propositions plaintiff denies the opening statement of defendant's argument under that head, that "Plaintiff's first cause of action is brought under the provisions of Chapter 71 of the Session Laws of Alaska, 1915, commonly known as the Workmen's Compensation Act." It is true that the case was tried upon that theory because the trial court so ruled, and the amended complaint stated the cause of action so as to comply with that requirement; but plaintiff contended then and does now that the act referred to is invalid because repugnant to the fourteenth amendment of the Federal constitution and to the organic act creating the Alaska legislature and defining its powers.

Assuming the Alaska compensation law to be

valid the question raised is whether an employe can claim any redress for an injury "arising out of his employment" or traceable to it further than that expressly provided in the schedules of the law. Defendant contends that the law is exclusive and inclusive, even in such cases as the one at bar. As shown in defendant's statement of the case plaintiff sued on two causes of action, the first alleging an injury due to an accident in the course of his employment, the second alleging aggravation of the natural results of the accident due to neglect and lack of skilful care of his injury by the defendant, which owed him competent surgical care and nursing because of his payment of hospital dues.

The contention that plaintiff has no remedy except under the so-called compensation law is based upon two provisions of the act. The first is contained in the first section providing that an employer of the class named in the act "shall be liable to pay compensation, in accordance with the schedule herein adopted, to each of his, her, their or its employees who receives a personal injury by accident arising out of and in the course of his or her employment." The second provision claimed as a base for the contention is the following:

"Section 7. The right to compensation for an injury and the remedy therefor granted by this Act shall be in lieu of all rights and remedies as to such injury now existing either at common law or otherwise, and no rights or remedies, except those provided by this Act, shall accrue to

employees entitled to compensation under this act while it is in effect.”

“Arising out of and in the course of employment,” a term almost universally used in compensation acts, is defined as follows by Labatt’s Master & Servant, Vol. 5, sec. 1806:

“This phrase embraces only those accidents which happen to a servant while he is engaged in the discharge of some function or duty which he is authorized to undertake, and which is calculated to further, directly or indirectly, the master’s business.”

Plaintiff contended at the trial and the trial court held that the aggravation of plaintiff’s original injury through the failure and wilful refusal of defendant to afford him the medical care he was entitled to was not “an injury arising out of or in the course of his employment,” but was a subsequent injury foreign to his employment and due to a new cause for which defendant was responsible. While the original injury primarily produced a condition which made the later injury possible the latter would not have arisen except for the new and independent cause. The additional injury, therefore, is not within the purview of the statute.

Arguing the exclusive feature of the Alaska law defendant cites the Washington case, *Ross v. Erickson Construction Co.*, P. 155, 153, conceding that it was based on “a different and more elaborate statute.” The *Ross* case cannot be cited as authority in this case because the Alaska law bears hardly a superficial resemblance to the Washington law. The

latter is an industrial insurance law, placing the whole subject of accidents in specified industries under the jurisdiction of an industrial insurance department, and creating a fund for payment of compensation. The law also declares its intent as follows:

“The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra-hazardous work, and their families and dependents, is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided.”

In *Stert v. Industrial Insurance Commission*, 158 P. 256, the supreme court of Washington says: (p. 259).

“Ours is not an employers’ liability act. It is not even an ordinary compensation act. It is an industrial insurance statute. Its administrative body is entitled the Industrial Insurance Commission. All the features of an insurance act are present. Not only are all remedies between master and servant abolished, and, in the words of the statute, all phases of them withdrawn from private controversy, but the employe is no longer to look to the master even for the scheduled and mandatory compensation.

He must look only to a fund fed by various employers. When the employer, for his part, pays his share into this fund, all obligation on his part to anybody is ended. Let a claim be rejected by the commission, the latter and not the employer is to be sued."

In the same opinion the court calls attention to the express definition of "injury" within the intentment of the act, as "an injury resulting from some fortuitous event." The statute avoids use of the word "accident."

Contrasted with this "exclusion of every other remedy" and withdrawal of the jurisdiction of the courts, and prompt payment of compensation through a state insurance board, is the provision of the Alaska law, (section 21) that "actions for recovery of compensation due under this act may be brought and determined in the courts of the territory." Clearly, decisions under the Washington law have no application to the Alaska law. Furthermore, in the Ross case the plaintiff had applied for and accepted an award by the state insurance board. And finally, the Washington supreme court conceded in that case that

"An independent cause that in no way proximates the act out of which the right to compensation flows, might afford a ground of recovery, and might not be considered an 'aggravation' warranting an increase of compensation within the meaning of the act."

This reference to "aggravation" is to section "h" of the compensation schedule of the Washington law. So that even the state of Washington, with

its comprehensive plan of industrial insurance and its declared legislative intention to remove all phases of the matter of industrial accidents and compensation from private controversy does not deny that a case not within the expressed provisions of the law still stands as before the enactment.

None of the other cases cited by defendant's brief involved the same issue as the one under discussion here. *Gregutis v. Waclark Wire Works*, 92 Atl. 355, was an action to recover for accidental death and the sole question was whether the New Jersey compensation law superseded what was known as the Death Act, a law enacted to give a right of suit for death by wrongful act, a right which, as every lawyer knows, did not exist under the common law. The decedent was instantly killed, so no question of subsequent injury or aggravation of injury arose in the case.

In *Re. Brightman*, 107 N. E. 527, decedent was a cook on a lighter. The craft began to sink and he made several hurried trips from the lighter to the wharf carrying personal effects. He died soon afterward and the employer's insurer sought to defeat the claim for his death under the Massachusetts compensation law upon the ground that death did not result from a cause arising out of or in the course of his employment. The court held otherwise. No question of subsequent injury or aggravation not in the course of employment was involved.

Re. Sponatski, 108 N. E. 466, was another Massachusetts case in which an insurer sought to defeat

recovery. A workman made temporarily insane by a splash of molten metal in his eye jumped from a window and was fatally injured. The court said, "The inquiry relates solely to the chain of causation between the injury and the death," and decided the question in all such cases to be "whether the chain of causation between the injury and the death is broken by the intervention of some independent agency."

In all cases cited by defendant's brief the injured workman or his legal representative sought to recover under the compensation law and the employer or an insurer sought to show that the case did not come under the compensation law. In *Re. Burns*, 105 N. E. 601, (Massachusetts) the facts are stated by the court as follows:

"He had sustained a mortal injury, one from which death must sooner or later ensue, a fracture of the spine, with a severance of the spinal cord, which caused not only a complete paralysis of the lower limbs, but a loss of power and sensation below the seat of the injury. He was taken to a hospital, and afterwards was under proper medical care until his death. He was obliged to lie in bed in one position; and by reason of this an extensive bed sore was developed, and this extended and grew worse until it brought about the blood poisoning which was the immediate cause of his death."

Is any independent, intervening agency stated here? The man's injury made it necessary for him to lie in bed in one position; he had proper medical care; but the bed sore developed and ultimately

caused blood poisoning from which death resulted. Is there any break there in the chain of direct causation? Was anything omitted which would or could have arrested the course of nature?

The English cases cited, like the Massachusetts and New Jersey cases, do not fit the facts of the present case. In all but one it was held to be shown that the results were directly traceable to the original injury; that the chain of causation was complete. In only one was the issue of malpractice raised, and that by the employer. In *Beable v. Milton*, 5 W. C. C. 55, the court held that the treatment was not defective and if it had been it would have been no defense to the employer because the applicant had gone to the hospital with his privity and consent. It was the employer who sought under the claim of malpractice to avoid any payment.

Neither does the law stated in *Smith v. N. P. Ry. Co.*, 140 P. 687, deny plaintiff's right of action herein, but rather aids it, as the court held that if one is injured through another's negligence and the injury is afterwards aggravated "through some accident not the result of the want of ordinary care on the part of the injured person he may recover for the entire injury sustained."

Plaintiff's claim in this case under his second cause of action was that his injury was aggravated by the wilful refusal of defendant to give him the surgical and medical care to which he was entitled, which failure and not any "want of ordinary care on his part" caused the aggravation of injury.

A recent Kansas case under the compensation law of that state, *Ruth v. Witherspoon-Englar Co.*, 157 P. 403, on a state of facts almost precisely that in this case, states cogently the meaning of the phrase "out of and in the course of employment." It is thus set forth in the first clause of the syllabi:

"In an action under the Workmen's Compensation Act a recovery can be had only upon the basis of disability to labor received in the course of employment, without the intervention of an independent cause the separate consequences of which admit of definite ascertainment. It cannot be augmented by the fact that the disabling effects of the injury are increased or prolonged by incompetent or negligent surgical treatment even where the employer is responsible therefor."

In the foregoing case the plaintiff sought to recover compensation for total disability, alleging partial injury by the accident and total disability resulting from incompetent surgery employed for him by the defendant. At the same time he brought a separate action for additional damages because of the malpractice. The defendant appears to have agreed that the plaintiff's condition was mainly due to unskilful treatment, although as the court said, "this issue was somewhat obliquely introduced by the pleadings." The defendant pleaded the other action and the plaintiff's allegations therein. Judgment for total disability was given and reversed on appeal, the supreme court saying:

"The plaintiff was entitled to recover com-

pension based only on such disability, total or partial, as resulted from the injury received in the course of his work, without the intervention of an independent agency. The matter is not confused by the need of determining what results might have been anticipated, or by any refined distinctions between proximate and remote causes; for whether and to what extent disability in such a case as the present has been increased by want of proper surgical care admits of reasonable definiteness and certainty. If it should be proved here, for instance, that the whole effects of the plaintiff's injury would under proper treatment have disappeared within a year, that would obviously be the limit of the period for which he could recover compensation in this action. His judgment here could not be increased by the fact that through the incompetent or negligent handling of the case by physicians a disability which would otherwise have been temporary was rendered permanent. *Della Rocca v. Stanley Jones & Co.*, (1914) W. C. & Ins. Rep. 33, annotated in 6 N. C. C. A. 624. Even if circumstances had been shown sufficient to charge the defendant with responsibility for the fault of the physicians, the rule would not be altered; for liability under the compensation act cannot be made to depend upon the degree of care exercised. A part of the loss occasioned by an accidental injury to a workman is cast upon the employer, not as reparation for wrongdoing, but on the theory that it should be treated as part of the ordinary expense of operation. So much of an employe's incapacity as is the direct result of unskillful medical treatment does not arise 'out of and in the course of his employ-

ment' within the meaning of that phrase as used in the statute. Laws 1911, c. 218, Sec. 1. For that part of his injury his remedy is against the persons answerable therefor under the general law of negligence, whether or not his employer be of the number. It was doubtless desirable that the malpractice issue should have been distinctly presented in the pleadings, but in any event it was incumbent on the plaintiff to show what degree and duration of incapacity was the direct result of the original injury received in the course of his work, without the intervention of an independent cause."

The Kansas compensation law under which this decision was rendered stated its scope as applying to "personal injury by accident arising out of and in the course of employment," the exact language of the Alaska law. Plaintiff submits that the foregoing extract from the opinion of the Kansas supreme court is irrefutable in its logic and exhausts argument on the issue.

Second. Defendant next urges that "This joinder of actions cannot be maintained."

Compiled Laws of Alaska, 1913, Section 916, provides that "The plaintiff may unite several causes of action in the same complaint when they all arise out of—First. Contract, express or implied; Second. Injuries, with or without force, to the person. * * * * "But the causes of action so united must all belong to one only of these classes, and must affect all the parties to the action and not require different places of trial, and must be separately stated."

No attempt is made by defendant to argue that plaintiff's complaint fails to meet the requirements of the second class named, but counsel seek to uphold their contention by vague reliance upon decisions under other codes of practice holding that common law and statutory causes of action, and tort and contract causes cannot be joined. Any authorities in support of those propositions are inapplicable to this case. First; because in Alaska common law and statutory causes can be joined in the same action if all belong to the same class and comply with all other conditions of section 916, *supra*. Second; tort and contract can be joined if they comply with the requirements, or by the weight of authority they can be united regardless of class if they grow out of the same transaction although the code does not expressly so provide. Third; it is not true that the first cause of action herein is founded in tort and the second in contract.

We will consider first the question whether either or both of the causes of action is strictly in tort or contract. Defendant asserts "That the first cause of action is an action *ex delicto* needs no argument." (brief, p. 52) With equal confidence the court of errors and appeals of New Jersey asserts:

"The liability enforceable in a proceeding under the Workman's Compensation Act is not a liability arising out of negligence but a contractual relation created by the act with the consent of both employer and employe." *Winfield v. Erie R. Co.*, 96 Atl. 394.

And the court adds that this obligation "exists

although no negligence can be imputed to the employer." (p. 383) To the same effect the Massachusetts supreme judicial court says of the compensation law of that state:

"It is plain and has been said repeatedly that the act eliminates all consideration of tort, penalty or negligence, save where there has been 'serious or wilful misconduct.' " Re. Madden, 111 N. E. 379-383.

It is difficult to see why counsel for defendant reiterate from time to time that the first cause of action is founded in tort. This would be true if the compensation law were not involved, but repeatedly in the pleadings and in a general objection to the introduction of testimony, (R. 60) counsel contended that the first cause of action was governed wholly by the Alaska compensation law and therefore the measure of compensation was controlled by that law. Counsel objected to the admission of any testimony designed to show the primary cause of the injury. By stipulation in open court the facts of the case as stated by plaintiff's complaint up to the occurrence of the accident were admitted and that portion of the complaint was read to the jury as evidence. (R. 65-66) The following proceedings then took place.

"Q. (By plaintiff's counsel) What caused the car to strike that rock wall?

Mr. DONOHOE.—We object to that as incompetent, irrelevant and immaterial—we admit he did strike the wall and got injured.

By The COURT—In view of the pleadings and the admission the objection is sustained.

Plaintiff allowed an exception to the ruling.

Mr. RITCHIE.—In order to save the record we desire to make an offer to prove by this witness—

Mr. DONOHOE.—I insist on the jury being dismissed before that is done, or that it be reduced to writing.

(Whereupon, without the hearing of the jury, in the presence of counsel and the court, the following proceedings were had:)

Mr. RITCHIE.—We offer to prove by the testimony of plaintiff that the cause of the contact of the car with the rock wall in said mine, resulting in the injury to plaintiff as set out in plaintiff's first cause of action was due to a defective brake on said car, causing the same to become uncontrollable and to run away at great speed."

By The COURT.—The offer to prove will be denied and exception allowed plaintiff." (R. 66-7).

Counsel for defendant insisted throughout that the liability on the first cause of action was defined and limited by the compensation law, a contention that nobody will dispute if the law is valid. After laboring throughout the trial to make a panoply and shield of the act counsel certainly become involved in confusion of thought when they now attack the basic principle of compensation laws by arguing that a liability under this act is founded in tort. A liability for a tort is for unliquidated damages, arising out of a wrongful act. Compensation laws provide fixed payments for described injuries occurring within the scope of the law. The Alaska act provides in its

first section that employers of a certain class,

“Shall be liable to pay compensation, in accordance with the schedule herein adopted, to each of his, her, their or its employees who receives a personal injury arising out of and in the course of his or her employment.”

Section 7 provides that “The right to compensation and the remedy therefor granted by this Act shall be in lieu of all rights and remedies as to such injury now existing either at common law or otherwise.”

By taking away negligence as a condition of recovery a compensation law plainly eliminates the tortious character of injuries within its scope. The only proof required or admitted, as ruled by the trial court in this case, is that which shows the extent of the injury.

The question of tort also arises in considering the second cause of action, which the trial court held to be outside the scope of the compensation law. In their brief for defendant counsel do not touch upon the fixed principle of law that a breach of contract may be tortious, and that a plaintiff may treat the injury either as a breach of contract or a tort. The plaintiff in the case at bar was entitled to regard his second cause of action as either in tort or contract, so that regardless of any other ground of joinder it could be united with the first cause of action whether that is held to be a tort, as defendant contends, or a contract, as the courts of Massachusetts and New Jersey classify it. On this question of tort and contract the following authorities are illuminating:

“The difficulty of defining a tort in accurate phraseology was commented on by Finch, J., in *Rich v. New York Cent. R. Co.*, 87 N. Y. 382, 390, in the following language: ‘We have been unable to find any accurate and perfect definition of a tort. Between actions plainly *ex contractu* and those as clearly *ex delicto*, there exists what has been termed a border land, where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other, and become so nearly coincident as to make their practical separation somewhat difficult. The text writers either avoid a definition entirely or frame one plainly imperfect or depend upon one which they concede to be inaccurate, but hold sufficient for judicial purposes.’” 38 Cyc. 415, note 1.

“A tort may grow out of or be coincident with a contract, and a suit will lie in tort for an act of misfeasance or malfeasance, although a contractual relation may exist between the parties. Where there is an employment, which employment itself creates a duty, an action on the case will lie for a breach of that duty although it may consist in doing something contrary to an agreement made in the course of such employment, by the party upon whom the duty is cast. The rule has frequently been applied in actions against common carriers and other bailees, factors, brokers, and other agents, telegraph and telephone companies, physicians and surgeons, (citing *Randolph v. Snyder*,—Ky. 1910—129 S. W. 562) and in many other cases.” 38 Cyc. 428-9.

“In many cases an action as for a tort or an action as for a breach of contract may be brought by the same party on the same state of facts. The

tort in such a case is connected with the contract only as it enables the tort-feasor to bring the party wronged into it." Cooley on Torts, pp. 104-5, 2d Ed.

The second cause of action in plaintiff's complaint stated such a case. It was for a tortious breach of a contract and could be united in the same action with another cause of personal action between the same parties admitting the same place of trial and a similar judgment. Further, both causes grew out of the same transaction. A case almost parallel in facts is the Washington case of *Harding v. Ostrander Ry. & Timber Co.*, 116 P. 635. Harding alleged his injury in a logging camp and further injury and unnecessary suffering because the company wilfully neglected and refused for twenty-four hours to take him to a hospital, although it had exacted and withheld from his wages, as from all employes, \$1 per month for maintenance of a hospital for the care and treatment of injured employes. The defendant company demurred on the ground of misjoinder, alleging that plaintiff had united a cause of action *ex delictu* with a cause *ex contractu*. The Washington supreme court said: (p. 637-8).

"The differences in legal meaning between a tort and a contract are often extremely shadowy and indistinct. For instance, Mr. Bishop, in his work on Noncontract Law, Sec. 4, says: 'The word tort means nearly the same thing as the expression 'civil wrong.' It denotes an injury inflicted otherwise than by a mere breach of contract; or, to be more nicely accurate, a tort is one's disturbance in rights which the law has cre-

ated either in the absence of contract, or in consequence of a relation which a contract had established between the parties.'

"All the injuries complained of in the case at bar have their origin in contract. It is patent, therefore, that, in the larger sense, the entire causes of action spring from contractual relations."

The statement just quoted practically covers all the issue of misjoinder in the case under consideration. The entire transaction was grounded in contract, though the second involves a tortious phase. The cases cited by counsel on page 54 of their brief do not meet the issues. In *Boylan v. Hot Springs, etc.*, 132 U. S. 148, the plaintiff had been ejected from a train because he had failed to have the return coupon of his ticket stamped, as required by its terms. The court simply held that he had no cause of action because he had himself failed to comply with the contract.

In *Sanders v. Stimpson Mill Co.*, the plaintiff sought to recover damages for an injury due to an accidental shot from the gun of a hunter who was riding by permission on the tug of which plaintiff was engineer. He also asked for the expense of his surgical and medical care under general maritime law. It presented a widely different issue from the case at bar.

As for *Clark v. Great Northern Ry.*, 72 p. 477, which decided that cause of an action for breach of contract of carriage on a railroad ticket could not be united with a cause for injuries in being ejected from a train, it is not authority for this case, because the

joinder was of causes on a different basis and different state of facts from the case at bar, because it ignored the fact that only one transaction was involved, and finally, it is against the weight of authority, including *Harding v. Ostrander* etc., *supra*, from the same state, (*Washington*) and *Sloane v. So. Cal. R. Co.*, 44 P. 320 (Cal.), which involved precisely the same issues as the *Clark* case, that of a passenger with a ticket being ejected from a railroad train.

A long list of authorities on the point involved in this joinder issue may be found in a note to *Flint & Walling Mfg. Co. v. Becket*, 12 L. R. A., 924, (167 Ind., 70 N. E. 503). Throughout the decisions the rule is admitted that a tort arising out of contract may be treated as either a tort or a breach of contract.

And regardless of any other ground for joinder, it was proper under the second provision of section 916, *Alaska code*, *supra*, permitting two causes of action to be united when they all arise out of injuries with or without force to the person.

Defendant's objection that common law and statutory causes of action cannot be joined is denied by almost universal authority. One of the cases cited in defendant's brief, *McHugh v. St. Louis Transit Co.*, 88 S. W. 853, (Mo.) sustains the joinder, holding merely that the two could not be united in one count. The court said, as quoted in defendant's brief, "an action for damages at common law for negligence cannot be joined to one for statutory negligence, but the entire paragraph is as follows: (syllabus 2.)

“Under Rev. St. 1899, sec. 593, requiring separate causes of action united in the same petition to each be separately stated, with the relief sought in each, so that they may be distinguished, an action for damages at common law cannot be joined in the same count with one for statutory negligence.”

The petition in that case alleged that plaintiff was injured by the gross negligence of the defendant, a conductor of one of its streetcars having started the car while plaintiff was in the act of getting off. Further, that in so doing the company violated an ordinance of the city of St. Louis which required conductors not to permit women and children to alight from a car in motion. The supreme court said (p 855):

“That the petition states two causes of action is, we think, clear—They are independent of each other, and upon either an action might be maintained, but they cannot, under the rules of good pleading, be embraced in the same count. If embraced in the same petition, they should be stated in separate counts.”

Abernathy v. South & W. R. Co. 63 S. E. 180, cited by defendant, was a North Carolina case, involving title to land, trespass, condemnation proceedings and damage to a mine on the land. It bears no resemblance to this case. The following authorities uphold the joinder of common law and statutory demands for personal injuries in one action, between the same parties with the same place of trial. Mr. Labatt says:

“In England it has been customary to join

common-law and statutory causes of action in the same suit, and in spite of one judicial intimation adverse to this rule of procedure, its propriety may, perhaps, be regarded as being now no longer open to controversy.

“In Massachusetts the propriety of such a joinder has never, so far as the writer knows, been questioned, and a large number of cases might be cited in which the complainant has included counts setting forth claims both under the statute and at common law. A similar remark is applicable to the Alabama course of practice.” *Labatt’s Master and Servant*, Vol. 5, sec. 1738.

“It is common practice, and permissible, to join different counts based on the violation of different duties, and also counts based on the common law and counts based on a statute. And not only may the complaint join counts for a common law cause of action with counts based on a statute, but also counts based on different subdivisions of the statute.” *Bailey Personal Injuries*, Vol. III, sec. 846.

The provisions of the Alaska Code of Civil Procedure having been taken verbatim from the Oregon code, decisions of the Oregon courts are controlling. The recent Oregon case of *Hoag v. Washington-Oregon Corporation*, 147 P. 756, involved the question of common law and statutory joinder in a different way from that raised in the case at bar, but plaintiff submits that the reasoning of the court applies herein. On page 759 the opinion says:

“All breaches of legal duty arising out of one transaction, whether flowing from common law

or from the statute, constitute but one cause of action, unless the statutory remedy is so inconsistent with the common-law remedy that the same judgment could not be rendered upon recovery.’’

“The whole obligation of the employer to the employee is the sum of all the duties imposed by law, whether a common law or statute, and the rights of the employee to redress for a breach of these duties arises from the law, considered as a whole, irrespective of its source.”

Defendant’s contention on pages 56-7 of its brief that to allow these two causes of action to be maintained would permit plaintiff to be compensated twice for the same injury has already been answered in this brief. The two causes of action set up two injuries, one arising out of and in the course of employment and the other an additional injury not arising in the course of employment nor out of the employment but due to a tortious breach of contract. It is difficult to understand why counsel for defendant argue that these are “the same identical injuries.”

Defendant complains (Brief, p. 43) because evidence bearing upon the second cause of action may have influenced the jury in arriving at a verdict on the first cause of action and argues that “as to the first cause of action standing alone such testimony was highly prejudicial to the substantial rights of the defendant as it tended to bias and prejudice the jury against the defendant. That is the great vice of permitting the two causes of action to be joined.”

This solemn arraignment applies with equal

force to all cases, civil and criminal, wherein more than one count is pleaded. Even the technical common law system of pleading and practice allowed many kinds of joinder. The law is scrupulous about the rights of persons accused of crime, yet section 1024 of the Revised Statutes of the United States provides for joining in one indictment several charges for two or more acts or transactions connected together, or two or more acts or transactions of the same classes of crimes. Alaska has engrafted this provision verbatim upon its criminal code.

It is needless to suggest to this court that in the trial of such an indictment part or all the testimony offered to prove one count may have no connection with other counts. Yet the statute permits this "great vice" assuming that a jury of presumed intelligence, under proper instructions from the court, will, in considering each count apply only the evidence bearing upon it. So in civil trials involving joinder of causes of action the jury presumably exercises the same discretion. Codes of civil procedure are framed with that assumption in view. Inasmuch as it must be conceded that many cases of joinder are permitted as proper it must also be conceded that joinder is not harmful *per se*. Code provisions for joinder not permitted at common law arose from the admitted evils of a multiplicity of suits involving similar issues between the same parties. The scope of joinder provisions is constantly widening and in many states all causes of action arising out of the same transaction may be united in one suit.

However, the vice or virtue of joinders in general or of the particular joinder involved in the case at bar is not before the court. The question is whether it is permissible under the Alaska code, and plaintiff urges that the joinder is favored by the great weight of authority construing the Oregon codes, from which the provision relied on was taken, and similar codes, and further, by the constant tendency toward simplicity in procedure.

Defendant's third and fourth contentions as grouped in argument, namely, "that there is no evidence sufficient to sustain the judgment entered on plaintiff's first cause of action," and the same of the second cause of action, scarcely require answer in view of the practically uniform rule of federal courts not to inquire into a finding of fact included in the verdict of a jury. Nevertheless, plaintiff will here call attention to the testimony of plaintiff, given on pages 72-73-83 of the record, stating his own knowledge of his injuries; the testimony of Dr. Boyle given on pages 125-6-135 of the record; of Dr. Winans, given on pages 154-5 of the record; of Dr. Chase, given on page 169; all tending to show permanent injury to the shoulder. The weight of the evidence being for the jury questions of fact are no longer open.

Errors assigned in the instructions to the jury and urged by defendant are the following:

That No. 11, (R. 389, assignment xxiv) stating that if defendant denied the existence of plaintiff's disability and refused him further care, plaintiff thereupon became entitled to leave defendant's

premises and to control his own movements and defendant could not thereafter require him to return, was error because it assumed a fact not in evidence. The evidence is on pages 76-111-2 of the record. Plaintiff testified that Mr. Estey ordered him out of the bunkhouse and out of the company office. Estey was the chief authority at the Ellamar mine at that time, by admission of defendant. (R. 199) Dr. Duckwall had testified (R. 224) that he notified plaintiff that there was "nothing wrong with his right shoulder or right clavicle and that he could go to work in the mine as a miner any time he wanted to;" that he also made the same statement to the officers of the company.

Defendant excepts to Instruction 14 (R. 389, assignment xxv) in which the court gives the substance of plaintiff's complaint, on the ground that the statement is incomplete and incorrect. A reading of the instruction shows that the exception is wholly unfounded. The court merely stated the allegations of the complaint as averments by plaintiff.

Defendant excepts to instruction 16, (R. 390, assignment xxvi) that the payment of hospital dues by plaintiff was in effect a contract binding the defendant "to furnish the plaintiff competent surgical and medical attendance for any injury or illness arising in the course of his employment, providing that in the event of no specific agreement to the contrary defendant would not be required to make unusual or unnecessary expenditures but only such as the requirements of the case in the opinion of competent

physicians justly demanded. "Defendant argues (brief 66) that this was an instruction that defendant was obliged to keep a competent physician at the mine. Plaintiff submits that the instruction answers the objection. It would be difficult to make it more favorable to defendant without instructing the jury that defendant was not liable at all. The reference to "competent physicians" merely means that defendant would be liable for consequences if it failed to call a physician when one was needed. Instruction 25 (R. 321) specifically states that "the defendant company was not bound to maintain a physician and surgeon at its mine."

Defendant's objections to instructions 17 and 18 (R. 391-2, assignments xxvii-xxviii) appear to plaintiff to require no comment.

Assignment xxix (R. 393) alleges error in the refusal to instruct the jury that defendant might at any time lawfully require plaintiff to return to Ellamar for examination, basing it on the section of the compensation law which provides for such examination. In referring to this provision counsel neglect to quote the stipulation that the employee shall "at reasonable times" submit to examination. (Sec. 24, Chap. 71, Laws of Alaska, 1915.) The record shows that when the requests were made that plaintiff submit to examination at Ellamar he was living in Valdez, (R. 190-192). If defendant could require him to return from Valdez it could require him to return from New York. Furthermore, he did finally go to Ellamar for examination, (R. 232) and he sub-

mitted to examination by defendant's physician in Valdez just prior to the trial of the case. (R.245.) Further comment seems superfluous.

Plaintiff submits that the objections to refusals to instruct stated on pages 69-70-71-72, of defendant's brief and in assignments of error xxix, xxx, xxxi, xxxii, xxxiii and xxxiv are not well taken because all the law contained in the proffered instructions is covered in the instructions given by the court.

Assignment xxxvi raises the contention that defendant could demand that the court submit to the jury a form of verdict submitted by it. This was aptly answered by the court as follows: (R. 333).

"The Court is not submitting a verdict to the jury; the Court is submitting a form of verdict which they may use if they choose in making up their verdict; it is not directory to the jury—they will not use it unless they so desire, but if they so desire, they may use it in making up their verdict."

Counsel for plaintiff (defendant in error) respectfully submit that if either party received less than his due it was the plaintiff, who might with reason claim that the evidence justified a larger verdict than the jury returned; that the issues were fairly joined; that no errors of importance, if any, appear in the record either in the admission of evidence or instructions to the jury; and that the case was decided on its merits.

JOHN LYONS

E. E. RITCHIE

Attorneys for Defendant in Error.

